Nos. 292 and 296

In the Supreme Court of the United States

OCTOBER TERM, 1964

THE ATLANTIC REFINING COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION

THE GOODYEAR TIRE & RUBBER COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

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OPINIONS BELOW

The opinion of the court of appeals (A.R. 3282–3299, G.R. 3681–3697 [1]) is reported at 331 F. 2d 394.

[1] The record in this Court in No. 292 (*Atlantic Refining Co.*) is cited as "A.R.", and the record in No. 296 (*Goodyear Tire & Rubber Co.*) is cited as "G.R." These are the two records filed in the court below upon petitions to review the same Commission decision and order, and they contain much overlapping evidence. We have used the *Atlantic* record as our primary

The opinion of the Federal Trade Commission (A.R. 61–130; G.R. 118–187) is reported at 58 F.T.C. 309.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 1964 (A.R. 3299). The petitions for writ of certiorari were filed on July 17, 1964, and were granted on December 14, 1964 (A.R. 3301, G.R. 3699; 379 U.S. 943). The jurisdiction of this Court is conferred by 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Trade Commission properly held that it is an unfair method of competition, in violation of Section 5 of the Federal Trade Commission Act, for a major rubber company and a major oil company to enter into an agreement under which the oil company, in return for a commission, promotes the sale to its dealers of the rubber company's products.

2. Whether having found that such an agreement between petitioners The Atlantic Refining Company and The Goodyear Tire & Rubber Company violated Section 5, the Commission properly entered an order

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source and cite it alone for material duplicated in the two records.

The reason there are separate but overlapping records is that the Commission received evidence relating not only to the Atlantic-Goodyear contract (which evidence involves both petitioners and is contained in both records), but also to Atlantic's contract with Firestone (printed in the *Atlantic* record) and Goodyear's contracts with other oil companies (printed in the *Goodyear* record). The effect of the hearing examiner's order limiting the admissibility of the two latter categories of evidence to the party involved, is discussed *infra*, pp. 15–16, fn. 10.

prohibiting each petitioner from entering into or performing any similar agreement with any other company.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, provides in pertinent part:

> (a)(1) Unfair methods of competition in commerce, and unfair * * * acts or practices in commerce, are declared unlawful.
>
> * * * * *
>
> (6) The Commission is empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair * * * acts or practices in commerce.
>
> (b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair * * * act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. * * * If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partner-

ship, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. * * * After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require * * *.

STATEMENT

These cases present the question whether the so-called "sales commission" plan of distributing tires, batteries and accessories ("TBA") is an unfair method of competition under Section 5 of the Federal Trade Commission Act. Under the plan, an oil company agrees to promote the sale to its dealers of a tire company's TBA (known as "sponsored TBA") in return for a commission on the goods sold. The complaint of the Federal Trade Commission charged that The Atlantic Refining Company ("Atlantic") and The Goodyear Tire & Rubber Company ("Goodyear") violated Section 5 by entering into such a sales commission plan; and that like agreements between Atlantic and The Firestone Tire & Rubber Company ("Firestone") and between Goodyear and oil companies other than Atlantic were similarly illegal (A.R. 5–13). After full administrative proceedings, the

Commission in a lengthy opinion (A.R. 61–130) held that the sales commission method of distributing TBA violates Section 5, and ordered Atlantic and Goodyear to terminate their existing sales commission agreements and to refrain from entering into or performing any similar agreements with others (A.R. 131–134).[2]

1. THE COMPANIES INVOLVED

(a). *The Atlantic Refining Company.* Atlantic is a major producer, refiner and distributor of gasoline and other petroleum products (A.R. 82) which it sells in 17 states along the Eastern Seaboard (A.R. 2451). It divides the area into six marketing regions which, in turn, are subdivided into 29 districts (A.R. 43–44, 75, 83). In 1948 its sales in this area constituted 2½ percent of total national gasoline sales (A.R. 82, 2560–2561).[3] In 1954 Atlantic's total operating revenues exceeded $500 million (A.R. 82).

[2] In two companion cases, *In the Matter of Texaco, Inc. and The B. F. Goodrich Co.*, 58 FTC 1176; and *In the Matter of Shell Oil Company and The Firestone Tire & Rubber Company*, 58 FTC 371, the Commission held other sales commission agreements illegal and entered similar orders. In the *Texaco-Goodrich* case, the Court of Appeals for the District of Columbia Circuit (Judge Washington concurring in part and dissenting in part) reversed the Commission and remanded the cause to the agency with instructions to dismiss the complaint (*Texaco, Inc. et al.* v. *Federal Trade Commission*, 336 F. 2d 754, petition for writ of certiorari pending, No. 635, this Term). In a proceeding to review the Commission's decision in *Shell-Firestone*, the Fifth Circuit has heard oral argument. The clerk of that court has advised that the court intends to withhold decision until this Court has decided the present cases.

[3] Since Atlantic's 17-state marketing area accounted for about 36.7 percent of the gasoline sold in 1948 (American Petroleum Institute, Petroleum Facts and Figures, pp. 13–14), Atlantic's

Atlantic distributes its products to the general public through wholesale distributors and retail service station dealers (A.R. 82–83, 273).[4] Wholesale distributors maintain and operate bulk plants and delivery equipment (A.R. 88) and enter into contracts with Atlantic to purchase gasoline and lubricants (A.R. 89, 274, 2515, 2524). Retail dealers are subdivided into lessee dealers, who lease their service stations from Atlantic, and contract dealers, who either own their stations or lease them from someone other than Atlantic (A.R. 83, 87). (The relationship between Atlantic and its dealers is discussed below, pp. 7–11). In 1955 Atlantic had 2,493 lessee dealers, who purchased 39.1 percent of the gasoline sold by Atlantic, and 3,044 contract dealers, who bought 18.1 percent of such gasoline (A.R. 83, 273). Approximately 50 percent of the contract dealers operate service stations. The other 50 percent operate grocery stores, garages and other types of outlets which have gasoline pumps but which, in general, do not sell TBA (A.R. 86–87).

(b) *The Goodyear Tire & Rubber Company.* Goodyear is the largest manufacturer of rubber products in the United States. In 1954 its sales were more than $1 billion (A.R. 100).

Goodyear distributes tires, tubes and accessories

2.5 percent share of the national market represents about 6.8 percent of gasoline sales within the 17-state marketing area. Actually, Atlantic's share of its marketing area was somewhat higher because it covers only parts of some of these 17 states (A.R. 43, 75).

[4] Atlantic also sells to commercial accounts, who purchase for their own consumption rather than for resale (A.R. 82).

through 57 warehouses located throughout the country (A.R. 100). It does not warehouse batteries; "Goodyear" batteries are manufactured and directly distributed to Goodyear outlets by the Electric Auto-Lite Company and Gould-National Batteries, Inc. (A.R. 100–101).

Goodyear sells its products at wholesale and retail through approximately 500 company-owned stores and through numerous independent dealers (A.R. 101–102, 394). Its franchised dealers include more than 12,000 independent dealers, and some Atlantic wholesale petroleum distributors and retail petroleum jobbers (A.R. 101). Goodyear also has a substantial number of nonfranchised dealers; most service station customers, including Atlantic stations, are in this category (A.R. 101–102).

2. THE RELATIONSHIP BETWEEN ATLANTIC AND ITS DEALERS AND DISTRIBUTORS

The Commission found (A.R. 64; see the almost identical finding at A.R. 124) that "Atlantic has sufficient economic power over its wholesale and retail distributors to cause them to purchase substantial amounts of sponsored TBA***." This power flows primarily from three sources: (a) the short-term leases and gasoline contracts under which the dealers operate; (b) the loans of money and equipment that Atlantic makes to the dealers; (c) the control that Atlantic has over the advertising that may be displayed at its service stations.

(a) *The leases and contracts between Atlantic and its dealers and distributors.* The leases of Atlantic

service stations are standard documents prepared by Atlantic (A.R. 274; CX 86A–B, A.R. 2458; CX 88A1–2, A.R. 2466; CX 88E1–2, A.R. 2477[5]). The lease provides that the "sole purpose and use of the leased premises shall be the lawful, diligent and businesslike operation of a first-class automotive service station retailing petroleum products and TBA merchandise normally handled at competitive service station outlets" (A.R. 83–85; CX 88A1–2, A.R. 2467; CX 88E 1–2, A.R. 2478).

Although the terms of the leases range from three months to three years, the usual period is one year (A.R. 83 see A.R. 276, AX31A, A.R. 3274–3275; AX 18 (unprinted). In addition to signing a lease, the dealer also is required to sign a document known as the "Eleven Point Lease Letter," which obligates him to maintain his station in accordance with designated standards covering eleven categories of operations

[5] "CX" refers to Commission exhibits, and "AX" to Atlantic exhibits. There are no Goodyear exhibits.

[6] The letter specifies the following standards (CX 88B, A.R. 2473–2474):

"1. Housekeeping—Clean, sanitary premises, inside and out.

"2. Use and Upkeep—Careful use and upkeep of building and equipment in safe, good operating condition.

"3. Display—Neat, orderly arrangement of merchandise and advertising in a manner reasonably calculated to attract and solicit the attention of the motoring public.

"4. Illumination—Safe and adequate to attract customers during night operation.

"5. Personnel—Sufficient manpower to give prompt service and allocated to handle peak operating hours. Clean uniforms, courteous, trained to sell, adequate knowledge of services to be rendered.

"6. Hours of Operation—Uniform daily operating sched-

(A.R. 84–85, 274).[6] Atlantic may cancel the lease for various reasons, including delinquency in paying the rent for five days, and failure to comply with the requirements of the Eleven Point Lease Letter (A.R. 85; CX 250–272, A.R. 2963–2996). Atlantic has both threatened to cancel, and has cancelled, leases for these reasons (A.R. 85, CX 250–272, A.R. 2963–2996); some of these threats were made to dealers who had been with the company a long time or had sold large volumes of gasoline (A.R. 433, 439, 441, 536, 540–541). Atlantic reserves the right in all instances to decide whether to renew a lease (AX 31A, A.R. 3275).

Atlantic requires its lessee dealers to enter into contracts for the purchase from it of automotive lubricants (A.R. 85). While the dealers are not required by contract to handle only Atlantic gasoline, in fact they "purchase and resell Atlantic motor fuels exclusively" (A.R. 85–86).

Contract dealers also sign a standard form of agreement, usually for one year, under which they agree to purchase a specified annual amount of gasoline at

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ule based on buying habits of potential trade in the area.

"7. Services—At least on a par with competition as to kinds of services rendered and efficiency of performance.

"8. Adequate Inventory—Quality products and merchandise on hand to serve normal customer needs without delay.

"9. Sales Promotion—Regular program for expanding sales, involving direct mail campaigns, personal solicitation, and advertising.

"10. Prices—Competitive, quality and service considered.

"11. Accounting—Maintenance on current basis of records adequate to reflect financial status and return from various phases of your business."

prices which Atlantic sets from time to time (A.R. 87, 274; CX 90A–B, A.R. 2486–2487; CX 90C–D, A.R. 2491–2492). Atlantic agrees to loan to the dealer equipment such as gasoline pumps, storage tanks and compressors, to be used "for the purpose of storage and sale of motor fuel purchased solely from Atlantic," and the dealer agrees to indemnify Atlantic for any damages caused by or done to such equipment (A.R. 87, 274, 280; CX 90A–B, A.R. 2486–2490; CX 90C–D, A.R. 2491–2495). Either party may cancel the agreement for breach by the other, and the dealer commits a breach if any judgment is entered or process issued against him, or if he suffers "financial embarrassment," insolvency or bankruptcy (CX 90 A–B, A.R. 2488–2489; CX 90C–D, A.R. 2493–2494). In case of a breach by the dealer, Atlantic has the option of removing its equipment and requiring the dealer to pay the costs of installation and removal, or of leaving the equipment and requiring the dealer to pay therefor (A.R. 87–88; CX 90A–B, A.R. 2489; CX 90C–D, A.R. 2494). Like the lease with a lessee dealer, Atlantic is under no obligation to renew its agreement with a contract dealer (CX 90A–B, A.R. 2488; CX 90 C–D, A.R. 2493).

Wholesale distributors sign an annual agreement specifying the territory in which they may sell (CX 95D–F, A.R. 2515). Atlantic may suspend deliveries made to the distributor on credit if, in Atlantic's opinion, his financial responsibility becomes unsatisfactory (CX 95D–F, A.R. 2516). Atlantic has no obligation to renew a distributor's contract (see CX

95D–F, A.R. 2516), and it has eliminated many distributors (A.R. 295). Atlantic can, and does, increase or decrease a distributor's volume of business by changing the distribution outlet to which various dealers are assigned (A.R. 89–90, 350–351, 361–362; see A.R. 295).

(b) *Atlantic's loans to its dealers.* It costs between three and fifteen thousand dollars to purchase the initial stock of products and the equipment with which to open a new service station (A.R. 281). Many dealers cannot afford these costs, and in such situations Atlantic loans them the money (A.R. 277, 281, 953, 1057–1058, 1633–1634, 1961–1962, 2216–2217). As noted above, Atlantic loans equipment to contract dealers.

(c) *Atlantic's control over advertising displays at service stations.* Dealer leases require the lessee to have Atlantic's prior written consent (which it is stated will not be unreasonably withheld) before he places, alters, removes, defaces or obliterates any signs, trademarks or color arrangements appearing on the leased premises (CX 88A1–2, A.R. 2469; CX 88E1–2, A.R. 2480). Atlantic's policy is to have all its stations look uniform, including uniformity of advertising (A.R. 1056–1057, 1059, 2210–2212). The importance of gasoline station advertising is discussed *infra*, pp. 16–17, 23–24, 42.

3. THE SALES COMMISSION PLAN

Retail gasoline service stations are, by the very nature of their business, particularly well adapted to sell TBA (A.R. 147), and they constitute a large and

important market for such products (A.R. 16).[7] Since at least 1932 Atlantic has been distributing TBA to its dealers (A.R. 66–67). Prior to 1951, it did so under the so-called "purchase-resale" plan, under which it bought Lee tires, Exide Batteries and various accessories directly from the manufacturers, and resold them to its dealers and distributors (A.R. 66–78, 285–291).

In 1948 and 1949 Atlantic made a TBA brand preference survey among dealers representing seven major oil companies. The survey showed that 67 percent of the Atlantic dealers preferred Lee Tires, and that 79 percent preferred Exide batteries, over competing brands; and that only 11 percent preferred Goodyear tires and only 4 percent preferred Firestone tires (A.R. 67–68; CX 101A–Z20, A.C. 2569; CX 101Q, A.R. 2576). Atlantic stated that the study showed "A preference among Atlantic's dealers for Lee tires and Exide batteries that is very satisfactory" (CX 101A–Z20, A.R. 2565). In addition, 67 percent of the Atlantic dealers preferred to buy their TBA from several sources, and only 33 percent preferred to have a single source (A.R. 68; CX 101A–Z20, A.R. 2566).

While this study was under way, Atlantic also con-

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[7] A Goodyear official stated in 1952 that 30 percent of all TBA had been sold through service stations in 1951, and estimated that the share would increase to 35 percent in 1952 (CX 66A–L, G.R. 2538). Goodyear also estimated that the service stations' share of total national TBA sales of $4 billion should be $1,540,000,000, or 37½ percent (CX 247B, A.R. 2940–2941). Atlantic stated that 35 percent of motorists' tire purchases in 1956 had been made through service stations (AX A–20, A.R. 3259).

sidered entering into a sales commission contract with a tire company by which the latter, rather than Atlantic, would sell TBA to Atlantic dealers and distributors. It sent letters to five major tire manufacturers (Goodyear, Firestone, the United States Rubber Co., The B. F. Goodrich Company, and General Tire & Rubber Company) inquiring "what interest you may have in the sale of your tires and tubes through Atlantic outlets" (CX 1A, A.R. 2337–2338; CX 99, A.R. 2559–2560). To assist the companies in preparing quotations Atlantic inclosed "data pertain[ing] to what we have to offer" (CX 1A–1B, A.R. 2337–2338; CX 99, A.R. 2559), which set forth "Estimated Annual Requirements," number of retailers and wholesalers "Served," and Atlantic's marketing area (CX 1B, A.R. 2338). Although Goodyear "recognize[d] the importance and value of your account" (CX 2, A.R. 2340), both it and Firestone refused to enter into any agreement covering tires alone, and they insisted on selling their full line of TBA to Atlantic (CX 103, A.R. 2607; CX 305A–B, A.R. 3065–3066; CX 355A–B, A.R. 3157).

In 1950 Atlantic tested the Goodyear and Firestone sales commission programs in three districts (A.R. 70–71). Apparently satisfied with the results,[8] Atlantic in February 1951 decided to "swing over to the Commission Plan of T.B.A. marketing * * *"

[8] Shortly after the test programs were instituted, Atlantic conducted a poll of its dealers in the test areas to determine their preference as between the Lee-Exide program and the new sales commission plan. Of those responding, 45 percent favored the new plan, 40 percent preferred the old program, and 15 percent had no preference (A.R. 71).

(A.R. 72–73), and entered into contracts for such plans with Goodyear and Firestone (CX 13, A.R. 2360; CX 16, A.R. 2368; CX 104A–C, A.R. 2609; CX 106A–B, A.R. 2616). "It was arranged for three regions (Philadelphia-New Jersey, New England and New York) to market the program of the Goodyear Tire and Rubber Company, and the other three (Eastern Pennsylvania, Western Pennsylvania, and the South) were to market the program of the Firestone Tire and Rubber Company" (A.R. 73; CX 16, A.R. 2368; CX 106A–B, A.R. 2616).

The Atlantic-Goodyear contract requires Atlantic "actively [to] assist" Goodyear in "selling and promoting" Goodyear TBA (CX 13, A.R. 2360).[6] Atlantic agreed, among other things: to have its field offices "work energetically" with Goodyear in order to assist it "to the fullest practicable extent in perfecting sales, credit, and merchandising arrangements" with Atlantic outlets; to have its field representatives "suggest" to dealers "the maintenance of adequate stocks of [sponsored] merchandise" and counsel dealers "as to the maintenance of proper identification and advertising" of such merchandise; to instruct its salesmen to encourage dealers "vigorously" to represent Goodyear; to have its "representatives call upon these customers [Atlantic outlets] in company with our

[6] CX 13 was the agreement covering the 1950 test of the Goodyear plan. In 1951 its terms were extended to cover the entire area in which the Goodyear plan was to operate (CX 16, A.R. 2368–2369). The Firestone contract cited in the text similarly originally covered only the 1950 test, but was extended in 1951 to the entire area assigned to Firestone (CX 104A–C, A.R. 2609; CX 106A–B, A.R. 2616).

[Goodyear's] salesmen"; to "cooperate with and assist" Goodyear in its "efforts to promote and increase the sale" by Atlantic dealers of sponsored merchandise; and to "maintain adequate dealer training programs in the sale of tires, batteries and accessories" (CX 13, A.R. 2360–2362). Atlantic's contract with Firestone similarly requires the oil company's sales organization to give "assistance and cooperation * * * in promoting the sale" of Firestone TBA, but it does not give specific details (CX 104A–C, A.R. 2609).

In return for these services, Goodyear and Firestone agreed to pay Atlantic a commission equal to 10 percent of their net sales to Atlantic's retail dealers and 7½ percent of their net sales to its wholesalers (A.R. 79–80). Under the plan, each Atlantic dealer or wholesaler is assigned to a particular "supply point" which is his source for sponsored TBA; this supply point may be a Goodyear (or Firestone) store, an independent Goodyear (or Firestone) dealer, or, occasionally, an Atlantic distributor or even an Atlantic retail dealer (A.R. 102–105; CX 13, A.R. 2361). No commission is paid "unless the Atlantic outlet purchases from the designated supply point to which it has been assigned" (A.R. 103).

4. THE OPERATION OF THE SALES COMMISSION PLAN [10]

(a) *The change-over to Goodyear and Firestone TBA.* Atlantic took immediate steps to carry out its

[10] While the hearing examiner entered an order (G.R. 90–93) which limited the use of evidence concerning the Atlantic-Firestone plan to the case against Atlantic and struck such evidence as against Goodyear, the latter does not rely on the order in challenging the Commission's case against it. Atlantic,

contractual obligations to promote the sale of sponsored TBA. It sent its dealers a letter announcing the change to the sales commission plan and describing its alleged virtues (CX 12, A.R. 2359; CX 29, A.R. 2397). Atlantic also held numerous meetings with its dealers at which both its and the tire company's representatives explained the new program and urged the dealers to promote the sponsored TBA (A.R. 165, 369, 2240; CX 27, A.R. 2393, CX 109A–I, A.R. 2640; CX 135A–C, A.R. 2706). A Goodyear outline of the presentation which its district managers were to make at such meetings included these statements: "After years of courtship Atlantic and Goodyear have wed"; "We welcome wholeheartedly this merger"; Atlantic and Goodyear "will combine [illegible]rts" and "can and will be a winning combination"; the dealers' "cooperation and patience in these days of shortages will be appreciated" (CX 27, A.R. 2393–2394). As noted above, Atlantic's leases gave it control over advertis-

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in discussing its relations with its dealers and its implementation of the sales commission system (Atlantic Br. pp. 8–10, 15–17), does not distinguish between the Goodyear and Firestone plans. Petitioners thus do not question that the Goodyear and Firestone systems constitute a single interrelated plan of operation, so that evidence as to Atlantic's operations under either plan is relevant to its overall course of conduct and the latter's effect on competition. We shall therefore refer to the evidence under both plans in discussing Atlantic's activities, although, of course, Goodyear is not bound by the evidence as to Firestone's agreement with Atlantic. The examiner entered a similar order (A.R. 38–41) limiting the evidence respecting Goodyear's plans with other oil companies to the case against Goodyear, and striking it as to Atlantic. That evidence is pertinent only as to the scope of the order against Goodyear, discussed below, pp. 73–84.

ing displayed at the service stations. Atlantic gave Goodyear and Firestone lists of its dealers who handled TBA, so that the tire companies could remove the identification and advertising of other TBA and install their own (A.R. 291–292, 436, 538, 1532; CX 138, A.R. 2721; CX 277, A.R. 2998). Advertising of competing products was replaced by Goodyear advertising even though the dealers did not request the change, were opposed to it, or wished to carry the products whose advertising was removed (A.R. 436–437, 538, 1532; CX 277, A.R. 2998; see A.R. 910). Goodyear sent Atlantic the names of dealers who refused to permit installation of Goodyear advertising (CX 161–172B, A.R. 2787–2826), and Atlantic, which was "very definitely concerned about the refusal of dealers to permit Goodyear identification at their stations" (CX 162, A.R. 2790), forwarded their names to its district offices for "appropriate action" (CX 170A, A.R. 2812; CX 171A, A.R. 2820; CX 172A, A.R. 2825; see CX 163, A.R. 2792).

Atlantic salesmen, in company with Goodyear or Firestone personnel, called on dealers and discussed the switchover to the sales commission program (A.R. 1461; CX 24, A.R. 2384, 2389–2390; CX 109A–I, A.R. 2640; CX 135A–C, A.R. 2706). Goodyear considers such joint action "necessary" because the Atlantic salesman has "the 'in' with the account" (CX 24, A.R. 2389). Atlantic, which was required to protect its dealers against losses from defective Lee Tires, replaced such tires with Goodyear or Firestone instead of with Lee products (A.R. 293; CX 33, A.R. 2400–2401; CX 34–34C, A.R. 2402–2404; CX 139A–B, A.R.

2722). Similar steps were taken with respect to Exide batteries (A.R. 293; CX 37–39, A.R. 2408–2411; CX 139A–B, A.R. 2722). Goodyear and Atlantic relabeled unsponsored merchandise on dealers' shelves so that it would bear the Goodyear name (A.R. 167, 680, 1724; CX 48B–E, A.R. 2432). During 1951 and 1952 Atlantic credit cards were expressly limited to TBA "recommended by Atlantic"; credit card sales account for as much as 25 to 35 percent of a dealer's business (A.R. 293, 871, 950; CX 217A–B, A.R. 2925; see CX 146A–B, A.R. 2738).

By October, 1951—approximately seven months after the sales commission plans had gone into effect—Goodyear had signed contracts with 98 percent of Atlantic's outlets in its New England marketing area and with 96 percent of the outlets in its New York area (CX 179A–I, A.R. 2841).

In 1949, the last full year in which Atlantic operated its purchase-resale plan, its total TBA sales to its dealers were $6,697,471; and in 1950, when it operated the plan in all but the 3 of its 29 districts in which it was testing the sales commission program, its sales to dealers were $7,581,760 (A.R. 76–77). The sales commission plan became effective March 1, 1951; in that year Goodyear and Firestone made sales to Atlantic outlets of $5,689,158 (A.R. 76). In the latter part of that same year Lee and Exide estimated that, despite a greatly increased sales effort, they would be able to obtain from Atlantic only about 25 percent of their former business (CX 292A, A.R. 3044; CX 311, A.R. 3075–3076). In 1952, the first full year under the sales commission plan, total TBA

sales by Goodyear and Firestone to Atlantic outlets increased to $8,525,506 (A.R. 76).

(b) *The present operation of the sales commission plan.* Atlantic has continued its efforts to promote the sale of sponsored TBA to its dealers and distributors. These efforts begin with the selection and training of new dealers.

Prospective dealers are given three separate interviews—with an Atlantic salesman, the sales supervisor and the district manager—and sponsored TBA is thoroughly discussed and recommended on each occasion (A.R. 1438–1439, 1459, 1768, 1772, 1913, 1920, 2193–2194). If an applicant is tentatively selected to be a dealer, prior to his final selection he attends a five-week training school run by Atlantic (A.R. 277–278, 1433). Sponsored TBA is strongly emphasized during this course and sponsored products are used as props in TBA demonstrations (see CX 357A–364, A.R. 3260–3273 for the outline of the TBA material presented in this course, and A.R. 278–279). The discussion of TBA, which is conducted by representatives of both Atlantic and the tire company, is in terms of the sponsored products (A.R. 863, 864, 903, 937, 914–915; see 1868, 2034). Instructors stated that sponsored TBA was the dealers' "best bet," and that "when things got rough * * * the independent jobbers wouldn't be of any use to us or any help to us at all" (A.R. 864). While the Atlantic instructors indicated that the dealers would not be forced to buy sponsored TBA, "[t]hey did, however, stress that Atlantic more or less expected us to" (A.R. 915, 917, 918); that it was

"more or less I think understood" that dealers had to handle sponsored products (A.R. 937).[11] Atlantic representatives at the training course said that "they tried to keep all their stations uniform", which, in Firestone territory, meant "using Firestone products" (A.R. 1056).

Atlantic gives Goodyear and Firestone advance notice of station openings and reassignments (A.R. 1811; CX 176, A.R. 2836; CX 185, A.R. 2863). This notice is designed to enable the tire companies "to anticipate and to move promptly in handling the new dealer's requirements" (CX 176, A.R. 2836; CX 185, A.R. 2863). Atlantic also introduces a new dealer to his supply point before his station opens (A.R. 1811–1812). At times Atlantic has made a loan to a new dealer (see *supra*, p. 11) in the form of supplying sponsored TBA rather than providing cash (A.R. 953, 1058). The result of these activities by Atlantic is that Goodyear and Firestone generally obtain a deal-

[11] The testimony on this point of witness Hawes, a dealer in Firestone territory, who has been partially quoted above, was as follows (A.R. 937–938):

Q. Which tire were they talking about [at the dealer training school]?

A. Firestone. That is all we ever heard in there, Firestone.

Q. Did anyone ever tell you that you were supposed to handle Firestone when you were in your station?

A. Well, that is a question I wouldn't like to say that it was put to me that I had to. But it was more or less I think understood. For instance, when I was called back to Wilmington to buy all my accessories and so forth, it was a Firestone dealer who was there. There was nobody else there. It was a man that I was expected to buy from.

er's initial stocking orders of TBA (A.R. 207–208, 382–383, 707, 760, 895–896).

Once a dealer is established in his station, Atlantic continues to promote the sale to him of sponsored TBA. Atlantic and tire company salesmen regularly visit the dealer together (A.R. 314, 1461, 1791, 1831, 2323; CX 11, A.R. 2357; CX 364, A.R. 3173; CX 365A–B, A.R. 3174; CX 13, A.R. 2361). Atlantic salesmen, who make the initial recommendation as to whether a dealer's lease should be renewed (A.R. 1506; see A.R. 2718), promote dealer purchases of sponsored TBA (A.R. 270, 1453, 1787–1788, 1920, 2050), check dealers' stocks of TBA (A.R. 1459, 1498–1499, 1790) and actually solicit orders of sponsored products (A.R. 181, 409, 905, 1459, 1492, 1790, 1817; CX 109A–I, A.R. 2642).[12] Atlantic has established

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[12] Matthews, a dealer in Goodyear territory, gave the following descriptions of how Atlantic salesmen sold him sponsored TBA (A.R. 444):

> Q. Did Atlantic salesmen or Mr. Parris [who owned a supply point] ever write up tire orders without your request?
>
> A. The salesman did, he sent in oil filters one time without my request and there were so many complaints from other dealers that Mr. Parris called me a day later and after he had sent them and said he understood that was the situation and he wanted to know if I wanted to send them back.
>
> * * * * *
>
> Q. Now, with respect to tire orders, did Atlantic salesmen write up tire orders for you?
>
> A. Usually Mr. Parris did.
>
> Q. And would you request certain purchases or how was this done?
>
> A. Uusually they'd come in and say "What sizes do you want?" It wasn't how many, they knew if you had a

"agreed upon attainable objective[s]" which represent the amounts of TBA the oil company expects each dealer to purchase (CX 155A–H, A.R. 2747–2748; CX 155I–M, A.R. 2753–2757; CX 157, A.R. 2759). Atlantic receives periodic reports showing the actual purchases, which permit a quick check on the attainment of these objectives (A.R. 407; CX 127A–H, A.R. 2675–2687; CX 130A–G, A.R. 2692; CX 42B–43B; G.R. 2458–2459; CX 44C, G.R. 2461; CX 227C–228K, G.R. 3064–3083.[13] An Atlantic dealer who sells Goodyear testified that his Atlantic salesman had a record book showing his TBA purchases from the assigned Goodyear supply point, and that the salesman would urge him to increase his purchases by references to the "attainable objective" (A.R. 636):

> They would say, "You're a little low this month, you're going to be a little under this year; can we get it up to show a little bit of an increase."

Atlantic salesmen have severely questioned and criticized the presence of unsponsored merchandise (A.R. 169–170, 438, 442–443, 485, 496, 498, 518, 539, 540, 635, 905, 906, 907, 928, 942), have told dealers not to

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> buck why they—and could afford to pay for them they were going to send them.

To the same effect, see the testimony of witness Balloran, at A.R. 657–658.

[13] An Atlantic document states that "A check on the progress of each account is made by comparing the activity reported * * * [on the reports showing each dealer's purchases]. If an account is not buying commensurate with the purchase level to which he is listed, this is quickly revealed in this comparison" (CX 179A–I, A.R. 2843).

display it (A.R. 496, 498, 540, 906, 910, see 653, 634), have told them to get rid of it (A.R. 438, 485, 518), have stated that Atlantic would like and expects dealers to purchase sponsored products (A.R. 905, 915; see 438, 986–987), and have stated that dealers are breaking their TBA agreements when they purchase unsponsored products (A.R. 910, 928).[14] In addition, from time to time Atlantic holds dealer meetings—which both the tire company and Atlantic representatives attend—at which sponsored TBA is discussed and promoted (A.R. 911–912, 937, 949–950).

Atlantic permits little or no advertising of unsponsored TBA at its stations (A.R. 1059). Atlantic

[14] A high Atlantic official described the duties of salesmen under the sales commission program as "a difficult policing job" because of the need "to closely co-ordinate the dealer's entire selling effort to be sure that his interest and those of our company are best guarded" (CX 100A–C, A.R. 2563). (This was in specific reference to the Firestone contract.) Policing the dealer in the company's interest is illustrated by this episode described by a dealer in Goodyear territory (A.R. 518):

> Q. Can you tell us who it was that complained [that the dealer witness was selling unsponsored merchandise]——
>
> A. (Interposing.) It was Tom Hayes [Atlantic salesman], George Arnholt [Atlantic official] and Ed Parris [Goodyear supply point dealer].
>
> Q. Do you recall their conversation relative to those problems?
>
> A. Well I remember one time he walked in behind Mr. Arnholt and I had Century tires and Tom Hayes was in front of him and he says to Tom Hayes—I recall this question—he said, "What kind of salesman are you with this man having Century tires in here," and Tom gave me a dirty look. And when it blew over, Tom came in and said, "I got the devil and you have to get rid of these tires. * * *"

salesmen told various dealers to remove or not to install such advertising (A.R. 173, 540; see 436, 538, 1532, 1598, and see 2998) and numerous witnesses testified that practically all Atlantic stations primarily or exclusively advertise Goodyear or Firestone TBA (A.R. 173, 203, 211, 242, 261, 382, 417, 728, 747, 850, 880, 895, 975, 1082, 1131). Atlantic has a package advertising arrangement which is available only to those dealers who carry sponsored TBA (A.R. 172–173). Although after 1952 Atlantic credit cards could be used to charge non-sponsored TBA, some dealers remained under the impression that the earlier prohibition on such use (see *supra*, p. 18) was still in effect (A.R. 174, 541, 951–952, 1061–1065, 1576–1578). While Atlantic ordinarily will repurchase a dealer's stock of TBA if the lease expires or is cancelled, it may refuse to repurchase unsponsored products (A.R. 171, 181–182, 949, 958).

Finally, Atlantic representatives threatened dealers with cancellation or non-renewal of their leases if they refused to purchase sponsored TBA or continued to handle non-sponsored brands. For example, Atlantic dealers were warned "to get rid of the Lee tires or else they would get rid of me * * *" (A.R. 485); that "if I didn't handle Firestone products I wouldn't long be an Atlantic operator-dealer" (A.R. 866); that "I couldn't handle" non-sponsored batteries and accessories and that "if I didn't handle according to what Atlantic handled, * * * I would lose my lease * * *" (A.R. 986–987); and that "If you do not remain a Firestone Dealer, you will not remain an Atlantic" (CX 320A–C, A.R. 3114). One

dealer testified that although he wanted to "continue to handle Lee tires," he did not do so because "I didn't want my lease cancelled"; that Atlantic asked him to agree to cancel his lease because "I wasn't buying [TBA] from the company as I was supposed to so they figured it was better for everyone concerned if I signed a mutual [cancellation] and they cancel my lease * * *"; that he refused such cancellation but, after being told that his lease would not be renewed, he agreed to "be a good boy" and "went one hundred percent Goodyear"; and that when he subsequently purchased ten non-sponsored batteries, he "was told at that time not to buy any more or they would find somebody with enough money to buy me out and that would be the end of my lease" (A.R. 438–441). Other instances of such threats are set forth in the hearing examiner's findings (A.R. 51–55), which the Commission adopted (A.R. 98).

5. THE EFFECT OF THE SALES COMMISSION PLAN UPON COMPETITION

As noted above (pp. 18–19), in the first full year of operation of the sales commission plan (1952), the sales by Goodyear and Firestone of TBA to Atlantic dealers were approximately 40 percent greater than the sales Atlantic had made during the last full year of the purchase-resale plan.

By June 1956, Goodyear had TBA contracts with 1960 of the 2420 Atlantic dealers in the areas allocated to it (CX 374, A.R. 3178; CX 400P–R, A.R. 3219). Although the record does not show the total number of dealers who had contracts with Firestone, Atlantic

believed that "virtually all" of its dealers in its Wilmington and Baltimore areas who were potential purchasers of sponsored TBA had signed initial franchise agreements with Firestone (A.R. 348, 359). During the six-year period between June, 1950 (when the sales commission plan was put into operation in three areas on a test basis) and June 1956, Goodyear sold more than $25 million, and Firestone more than $26 million worth of TBA to Atlantic outlets (A.R. 76, 294; CX 400D–E, A.R. 3209–3210).[15]

The effect of the sales commission plan has been to prevent wholesale suppliers of unsponsored TBA from selling their products to Atlantic stations (A.R. 210–211, 218, 230–233, 235, 237–239, 246, 381, 382, 383, 415–416, 422, 555–556, 557, 559, 619, 671, 680–681, 685, 694–705, 726–727, 742, 806, 817, 889–890, 893, 906–907, 971, 974, 1071–1072, 1082, 1120, 1129, 1130). Dealers and competing suppliers of TBA testified that it is difficult or impossible to sell to Atlantic dealers because the latter group felt that they were required to purchase sponsored TBA and feared reprisal by Atlantic if they purchased non-sponsored items (A.R. 182, 237, 239, 383, 415–416, 422, 427, 438–439, 444–445, 446, 557, 659, 671, 681, 695–704, 708, 742, 906–907, 910, 937–938, 970–971, 1059–1060, 1083, 1084, 1104, 1109, 1113, 1132–1134, 1157). Indeed, it is so difficult to sell competing TBA to Atlantic dealers that many wholesalers do not even try to solicit business from substantial numbers of such dealers (A.R. 200–201, 211, 414, 546–547, 766,

[15] Approximately 70 percent of these sales represented tires and tubes, with the remaining 30 percent equally divided between batteries and accessories (A.R. 80).

1031, 1101–1102, 1150.) In addition, wholesalers of sponsored products who are not designated as supply points were unable to sell such products to Atlantic dealers (A.R. 210–211, 230, 235, 383, 397–398, 556–557, 559, 634, 691–710, 726, 974, 1128–1130, 1153, 1157). Both categories of wholesalers were unable to sell to Atlantic dealers even though they offered a better price than is available under the sales commission plan (A.R. 559, 634, 1085).[16] Finally, as a result of Atlantic's separate contracts with Goodyear and Firestone covering different areas, Goodyear and Firestone limit their efforts to the assigned areas and do not compete with each other for sales to Atlantic dealers (A.R. 113–115, 124–125).[17]

Under the sales commission method, small TBA manufacturers find it difficult to sell to Atlantic (A.R. 128). An Atlantic vice president indicated that his company preferred to do business with a single supplier having many supply points and handling a full line of TBA than with many suppliers (A.R. 2299–3000; see CX 9, A.R. 2351; CX 136A–E, A.R. 2710; CX 147, A.R. 2739; CX 150, A.R. 2742–2743; CX 286B, A.R. 3021; CX 351A–C, A.R. 3141). Indeed, when Atlantic made its initial inquiries about the possibility of shifting to a sales commission plan, it ad-

[16] Atlantic sends so-called "spooks" into its stations who "offer merchandise at lower prices just to see if you would buy from someone else" (A.R. 556).

[17] As an example of this division of territories see the correspondence in which Goodyear requested Atlantic's advice before soliciting business from an Atlantic distributor in Firestone territory, and Atlantic disapproved such solicitation. CX 56–58, A.R. 2444–2447.

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dressed them only to five major tire companies (see *supra,* p. 13). Small suppliers that do not have distributional facilities that fully cover the oil company's marketing area cannot meet Atlantic's requirements (A.R. 2300; CX 136A–E, A.R. 2710; CX 147, A.R. 2739; CX 150, A.R. 2742–2743; CX 286B, A.R. 3021; CX 351A–C, A.R. 3141), and thus are denied access to Atlantic outlets even in areas where their products have good consumer acceptance (A.R. 1541, 1615; see A.R. 829).

6. THE COMMISSION DECISION

The Commission held that, by their use of the sales commission plan of distributing TBA, Atlantic and Goodyear engaged in unfair methods of competition and unfair acts and practices, in violation of Section 5 of the Federal Trade Commission Act.

The Commission affirmed the hearing examiner's finding that Atlantic had coerced its dealers into buying sponsored TBA through threats of cancellation or of non-renewal of leases or other retaliatory action (A.R. 64, 98–100; see A.R. 51–59).[18] But it "regard[ed] these overt acts of coercion as mere symptoms of a more fundamental restraint of trade inherent in the sales commission system itself [* * *, namely, its] competitive effects * * * on competitors of Goodyear and Firestone * * * [and its] impact upon whole-

[18] The examiner had held that Atlantic violated Section 5 by coercing a number of dealers to purchase sponsored TBA, and proposed a cease-and-desist order prohibiting only such coercion. He further held, however, that the sales commission agreement itself was not illegal, and dismissed the complaint as against Goodyear (A.R. 41–60).

sale and retail distributors of TBA engaged in competition with wholesale and retail distributors of Goodyear and Firestone" (A.R. 100).

Reviewing in detail the relationships between Atlantic and its dealers (A.R. 83–100, 107–113, 116–117), the Commission ruled that Atlantic "has sufficient economic power with respect to its wholesale and retail petroleum distributors to cause them to purchase substantial quantities of sponsored TBA even without the use of overt coercive tactics or of written or oral tying agreements * * *" (A.R. 124; see also A.R. 65); and that Atlantic "has used its power as a major wholesale and retail distributor of gasoline and as a lessor of numerous retail gasoline distribution facilities to cause its dealers to purchase very substantial amounts of a different class of products, TBA" (G.R. 179; several words are missing from this sentence of the opinion as reprinted at A.R. 122).

The Commission ruled that Atlantic's sales commission contracts had restrained competition in various ways. Among them were: other manufacturers and distributors of TBA were foreclosed from selling to Atlantic outlets—a foreclosure that was particularly injurious to the smaller TBA manufacturers (A.R. 118, 119–121, 125–126, 128); Goodyear and Firestone wholesalers who were not designated as supply points were foreclosed from Atlantic's business (A.R. 113–119, 125); service station operators were denied the benefits of competition between TBA sellers and the right to purchase from the seller who offered them the lowest price (A.R. 129); and "Firestone dealers are

foreclosed from Atlantic outlets in regions assigned to Goodyear, and Goodyear dealers are foreclosed from Atlantic outlets in regions assigned to Firestone" (A.R. 124–125; see A.R. 113–115). The Commission concluded (A.R. 128–129) that "the sales commission method of distributing TBA presents a classic example of the use of economic power in one market (here, gasoline distribution) to destroy competition in another market (TBA distribution)."

The Commission entered an order prohibiting Atlantic and Goodyear from entering into or carrying out such sales commission contracts with each other or with any other TBA or oil company, and prohibiting Atlantic from coercing its dealers to purchase TBA (A.R. 131–134).

7. THE COURT OF APPEALS DECISION

CA 7

~~The Court of Appeals for the Seventh Circuit~~ unanimously affirmed. It ruled (A.R. 3285) that "the record as a whole" contained substantial evidence "to support the Commission's ultimate findings and conclusions," and that its order was valid "in all respects."

The court held that the "heart of this case is the economic power Atlantic possesses over its service station dealers," and, in turn, "The keystone of the actual relationship between Atlantic and its dealers is the lease and the equipment loan contract with their short term and cancellation provisions" (A.R. 3292). While holding that the Commission's finding that Atlantic had co-

erced its dealers was supported by substantial evidence (R. 3293–3294), the court agreed that "Atlantic's power to cause its dealers to carry either Goodyear or Firestone TBA does not depend upon overt coercive methods. The totality of facts surrounding the relationship between the oil company and the dealers point to one conclusion: the oil company is able to exert sufficient economic power over its dealers so that for all practical purposes they are required to carry sponsored TBA" (A.R. 3295). In the setting of such "economic dependency," the court stated, "recommendation is tantamount to command. Covert practices are as efficient as overt action. Sophisticated methods of pressuring the dealers into carrying sponsored TBA are as effective as express covenants and open threats" (A.R. 3295).

The court concluded that the Commission had correctly ruled that the sales commission system is "in effect, a tying arrangement inherently anticompetitive" (A.R. 3297), which utilizes Atlantic's economic power over its dealers to foreclose competition for a substantial amount of commerce (R. 3296–3297):

> The Commission properly, we think, decided that the system integrates Atlantic's economic power over its service station market into the Goodyear TBA distribution system, thus giving Goodyear, for a price, a captive market.
> * * * the record substantiates the Commission's finding that suppliers of TBA competing with Goodyear and Firestone are substantially foreclosed from selling their products to Atlantic dealers. * * *

SUMMARY OF ARGUMENT

I

A. The unlawfulness of Atlantic's sales commission agreements with Goodyear and Firestone rests upon the Commission's findings that (1) Atlantic has the power to require its dealers to purchase substantial quantities of tires, batteries and accessories ("TBA") even without overt coercion; and (2) Atlantic's performance of its sales commission agreements constitute the exercise of its power to require such substantial purchases of sponsored TBA. Atlantic's power, based upon its disparately large size and financial resources, is embodied in leases of service stations and loans of equipment which are generally short-term, are subject to cancellation for various acts or defaults under vague operational standards, and the renewal of which is within Atlantic's discretion. The serious economic impact of cancellation or nonrenewal makes dealers subservient to an oil company's wishes (*Simpson* v. *Union Oil Co.*, 377 U.S. 13, 17). The dealers also depend upon Atlantic for supply of their principal commodity, gasoline. Atlantic's control over advertising at its dealers' service stations is a further element which, in particular, impedes dealers' freedom of choice with regard to TBA.

As required by its sales commission agreements, Atlantic took vigorous action to begin the sale of sponsored TBA to its dealers, by use of letters, meetings, salesmen's visits and control of display advertising and credit card sales. The striking and rapid shift

of Atlantic dealers to sponsored TBA from brands which they had previously preferred is the clearest evidence of the effectiveness of Atlantic's sponsorship. Atlantic's promotion of Goodyear and Firestone has continued through, *inter alia,* stress on sponsored TBA in the selection and training of new dealers; various pressures exerted by salesmen upon dealers to purchase sponsored TBA; and even resort to threats of cancellation or nonrenewal of dealer licenses. There is substantial evidence in the record that Atlantic dealers believe—as Atlantic obviously wants them to—that they are required to purchase their TBA from Goodyear and Firestone.

B. As a result of Atlantic's power and promotional activities, the sales commission plan injured competition in the distribution of TBA. It foreclosed manufacturers and suppliers of TBA competing with Goodyear and Firestone from a substantial market represented by Atlantic dealer outlets. Moreover, even wholesalers of sponsored TBA cannot sell to Atlantic dealers unless they are designated as authorized supply points. Finally, the division of the Atlantic marketing territory between Goodyear and Firestone eliminates competition between these two major firms in selling TBA to Atlantic dealers.

C. The Commission properly held that Atlantic's sales commission plan, having the above results, is an unfair method of competition violating Section 5 of the Federal Trade Commission Act. In administering Section 5, the Commission has authority to define unfair competitive practices and its conclusion is entitled to great weight (*Federal Trade Commission* v.

Cement Institute, 333 U.S. 683, 708–709, 720). The Commission found that Atlantic's plan, by pre-empting a substantial TBA market for Goodyear and Firestone, causes the same kind of competitive injury as an illegal tying agreement. This finding justifies the conclusion that the plan is an unfair method of competition, since it covered a very substantial amount of commerce—$50 million in sales of sponsored TBA in the first six years of operation. As in the analogous tying cases, no elaborate market analysis is required when foreclosure of a substantial market is demonstrated (*Northern Pacific Ry. Co.* v. *United States,* 356 U.S. 1; *United States* v. *Loew's, Inc.,* 371 U.S. 38). The argument that the sales commission plan is most economical for Atlantic cannot justify the restraint upon competition. This is especially so since Atlantic's TBA program is merely ancillary to its petroleum business and since there are other, less restrictive means of distributing TBA through oil company dealers.

II

A. Having held that the Atlantic-Goodyear agreement was an unfair method of competition, the Commission properly enjoined its performance. The Commission ruled that the illegality inhered in the agreement because it induces, even requires, Atlantic to engage in a course of conduct which has the effect of compelling its dealers to purchase sponsored TBA. It was for this integrated course of conduct that Goodyear undertook to pay a substantial commission. The Commission's prohibition against use of this

particular method of distributing TBA is obviously a far less drastic remedy than Goodyear's suggestion to change the basic relationship between Atlantic and its dealers.

B. Atlantic's conduct in performing its sales commission agreements with Goodyear and Firestone was essentially the same, and both contracts were found by the Commission to have unlawfully injured competition in the distribution of TBA. Atlantic's use of economic power would be equally present in any similar contract which Atlantic might enter with any other TBA firm. The Commission properly enjoined Atlantic from entering into or performing any similar sales commission agreement.

C. The Commission also properly enjoined Goodyear from entering into or performing similar contracts with oil companies other than Atlantic. Goodyear has been an active participant in the illegal program found in this case and "must expect some fencing in" (*Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 431). The record provided the Commission with sufficient basis to conclude (1) that the other oil companies with whom Goodyear had sales commission agreements had the same kind of economic power over their dealers as Atlantic; and (2) that in performing such agreements those companies did and were likely to do the same things that Atlantic had done, with the same adverse effect upon competition. The record shows that oil companies generally use the same lease and contract arrangements. Goodyear's sales commission contracts are

in standard form, and the record shows that oil companies other than Atlantic with whom Goodyear had contracts also used coercive tactics to require their dealers to purchase sponsored TBA. If, as Goodyear suggests, there are individual oil companies who either do not have power over their dealers or would not exercise it, the SG points out Goodyear may ask the Commission to modify the present order on the basis of the special facts of the particular case.

ARGUMENT

I

THE COMMISSION CORRECTLY HELD THAT ATLANTIC'S SALES COMMISSION AGREEMENTS WITH GOODYEAR AND FIRESTONE CONSTITUTE UNFAIR METHODS OF COMPETITION IN VIOLATION OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

The theory upon which the Federal Trade Commission held that Atlantic's sales commission agreements with Goodyear and Firestone violate Section 5 of the Federal Trade Commission Act was as follows: The various controls and pressures that Atlantic is able to exert on its dealers give it the power to require them to purchase substantial amounts of sponsored TBA. In performing its sales commission agreements with Goodyear and Firestone, Atlantic undertakes promotional activities which, because of its power over the dealers, has the effect of requiring them to make such purchases. The effect of thus preempting this substantial TBA market for Goodyear and Firestone has been to injure, among others: (1) competing

TBA manufacturers and suppliers who are foreclosed from selling in the market; (2) Goodyear and Firestone wholesalers who, because they are not authorized supply points, cannot sell to Atlantic dealers; and (3) the Atlantic dealers themselves, who are denied the right either to purchase competing brands of TBA or to purchase Goodyear and Firestone TBA from other distributors at lower prices than the authorized supply points offer. In short, the sales commission plan constitutes an unfair method of competition because it involves "the use of economic power in one market (here, gasoline distribution) to destroy competition in another market (TBA distribution)" (A.R. 128–129).

We shall show that the record fully supports the Commission's findings (1) that Atlantic does have such power over its dealers and has used it to require them to purchase substantial amounts of sponsored TBA, and (2) that the effect of such exercise of that power has been to injure competition at various levels of the TBA industry. We shall then show that the Commission correctly concluded that a distribution system having such anticompetitive consequences constitutes an unfair method of competition within the meaning of Section 5 of the Federal Trade Commission Act.[10]

[10] The Commission held (A.R. 64) that the Atlantic-Goodyear agreement constitutes both an "unfair method of competition" and an "unfair act or practice" under that Section. Whatever may be the distinction between those two concepts—and we express no opinion thereon—it is unimportant for this case, and we therefore rest on the holding that the sales commission plan is an unfair method of competition.

A. ATLANTIC HAS THE POWER TO REQUIRE ITS DEALERS TO PURCHASE SUBSTANTIAL QUANTITIES OF TBA AND, PURSUANT TO ITS AGREEMENTS WITH GOODYEAR AND FIRESTONE, HAS EXERCISED THE POWER TO ACCOMPLISH THAT RESULT

1. ATLANTIC'S RELATIONSHIP WITH ITS DEALERS GIVES IT THE POWER TO REQUIRE THEM TO PURCHASE SUBSTANTIAL QUANTITIES OF TBA

The basic fact of the relationship between Atlantic and its service station operators is that they do not deal with each other as economic equals. There is an obvious gross disparity in bargaining power.[20] Atlantic is a large company; its operating revenues in 1954 were more than half a billion dollars (A.R. 146–147). The average Atlantic dealer is a small businessman whose average net income is between six and ten thousand dollars (A.R. 112) and who, to an unusual extent, is dependent upon Atlantic for his economic well being. The cost of constructing a typical Atlantic service station is about $50,000, and few dealers have that much money (A.R. 111). Oil companies, therefore, have been forced to build a large number of their own stations and to lease them to operators (A.R. 112). Many dealers start in business with no more than $1,000, and few have as much as $15,000 (A.R. 111–112). Many do not even have the funds to purchase their initial inventory, and have to turn to Atlantic for a loan of several thousand dollars to finance it (A.R. 112). Atlantic also frequently loans dealers the equipment necessary to operate. It is in the light of these circumstances that

[20] While it is unquestionably true, as Atlantic states (Br. pp. 35–36), that it depends upon its dealers collectively to market its products, the critical question in determining Atlantic's power over its dealers is the relative economic strength of Atlantic and the individual dealer.

the relationship between Atlantic and its dealers must be appraised.

The court of appeals pointed out (A.R. 3292) that "[t]he heart of this case is the economic power Atlantic possesses over its service station dealers." The bases upon which this power rests are developed at length in the Statement, *supra*, pp. 7–11, 19–25.

"The keystone of the actual relationship between Atlantic and its dealers" as the court of appeals correctly observed (A.R. 3292), "is the lease and the equipment loan contract with their short term and cancellation provisions."[21] Although some of the service station leases run for three years, the usual term is only one year,[22] and Atlantic has complete discretion to decide whether to renew. In addition, Atlantic may cancel the lease for any violation of the necessarily vague operational standards set forth in the "Eleven Point Lease Letter" which every lessee dealer is required to sign. Contract dealers, who either own their stations or lease them from persons other than Atlantic, and to whom Atlantic loans various equipment needed to run the station, similarly operate under contracts that usually run for only a

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[21] Since the leases are standardized, their provisions are not the result of negotiation but are imposed upon the dealers as a condition of doing business (see *United States* v. *Sun Oil Co.*, 176 F. Supp. 715, 722 (E.D. Pa.), a circumstance which itself is indicative of disparate bargaining power.

[22] Although Atlantic states (Br. p. 9, fn. 3) that the proportion of lessees having three-year leases "[u]nquestionably" is "much higher" today than when the hearings were held, the record shows that in 1955 no more than "several hundred" of about 2,500 lessees had the longer term contracts (AX 18 (unprinted), CX 374, A.R. 3178). At that time, in 1955, there was a 30% annual turnover of Atlantic dealers (A.R. 285).

year, and the renewal of which lies in Atlantic's discretion. Such contracts are subject to cancellation by Atlantic for various acts or defaults of the dealer, including such conduct as suffering "financial embarrassment," and in the event of such cancellation Atlantic has the option of removing the leased equipment at the dealer's expense (which also includes the cost of its earlier installation) or requiring him to buy it. See *supra*, pp. 9–10.

The effect of cancellation or non-renewal of a dealer's franchise is particularly serious in the retail gasoline business. Since that business is largely local, the dealer's good will is closely tied to and dependent upon the particular station he has been operating and the particular brand of gasoline he has been selling. Thus, as the Ninth Circuit recognized in recently holding that similar lease and contract arrangements gave an oil company the requisite economic power to force its dealers to buy TBA (*Lessig* v. *Tidewater Oil Co.*, 327 F. 2d 459, 470, certiorari denied, 377 U.S. 993), the consequences of termination of a dealer's lease or contract

> were disproportionately grave to the dealer. Tidewater could substitute one dealer for another readily, or operate the station for itself. The dealer was economically bound to his station and to Tidewater's petroleum products; they were to him unique. The good will of his business attached to them; moreover, he was bound by contract to purchase his requirements of petroleum products from Tidewater; and even if he were free to shift, a change would

> involve substantial expense, and the dealer's economic resources were usually limited.

Indeed, even "[t]he changing over from one brand of petroleum products to another by a dealer [who owns his own station or leases it from a non-oil company source] subjects him to an economic hardship and even to the risk of a business failure" (*United States* v. *Sun Oil Co.,* 176 F. Supp. 714, 719 (E.D. Pa.)).[23]

This Court pointed out last term in *Simpson* v. *Union Oil Co.,* 377 U.S. 13, 17, a case involving resale price maintenance, that retail gasoline dealers' "fear of nonrenewal of short-term leases" by their oil company supplier may be a powerful and effective induce-

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[23] The district court in *Sun Oil* explained this economic risk as follows (176 F. Supp. at 719–720):

> To begin with, the major suppliers of petroleum products scrupulously respect the contractual arrangements of their competitors and will not supply a dealer with its brand of products unless it is certain that the full term of a previous supply contract has been legally terminated. And the dealer will not always be able to obtain the brand of petroleum products of his choice for his station may not fit into the distribution plan of the supplier. Even when a new supplier is secured a time lag between the removal of Sun's dispensing equipment and signs and the installation of the new and the repainting of the station inevitably takes place. Moreover it takes time before all the motorists in the locality who have a preference for the newly installed brand of gasoline become acquainted with the fact that it is being sold at the location. And there is always the chance that the new brand of gasoline and motor oil will not attract customers as well as the former brand did. Consequently the supplier's threat of cancellation of a supply agreement is not lightly received by a dealer, and he will usually hesitate before accepting an ultimatum to discontinue an established business under the banner of a proven profitable product.

ment to the dealers to follow the oil company's wishes. Other courts similarly have recognized that the disparity between the economic power of a large oil company and its dealers, coupled with the dealers' concern over the possibility of cancellation or non-renewal of their leases and operating contracts, makes them subservient to the oil company's wishes. *Lessig* and *Sun Oil, supra; Osborn* v. *Sinclair Refining Co.*, 286 F. 2d 832 (C.A. 4), certiorari denied, 366 U.S. 963.

A second source of Atlantic's power over its dealers, which is particularly relevant in compelling TBA purchases, is its control over advertising at service stations. For it is difficult to sell TBA that is not advertised and displayed, and a dealer is unlikely to purchase products that he cannot advertise.[24] Atlantic's authority to prevent its dealers from advertising non-sponsored TBA was a powerful weapon in preventing them from handling such products.

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[24] A wholesale supplier of competing TBA who operated in Atlantic's Goodyear territory testified as follows (A.R. 696):

> * * * I asked him [a Goodyear dealer], how about another case of Barsleak for stock, and he proceeded to tell me that if he bought it he would have to put it in the back room. He couldn't display it any more because he was told by his Atlantic representative salesman to take it off the shelf and only put the line which was carried by Atlantic on the shelf.
>
> So he said, "If I have to hide it in the back room, I would lose half of its saleability, so why should I continue to buy it?"

An Atlantic dealer similarly testified about the importance display advertising had upon his purchases (A.R. 634):

> A. After all, when a man sees a Goodyear sign up, he expects to buy Goodyear tires, so you try to deplete it

Third, Atlantic's control over the supply of gasoline gave it additional leverage over its outlets.[25]

The Commission thus reflected the realities of the retail gasoline business when it found that "Atlantic has sufficient economic power over its wholesale and retail distributors to cause them to purchase substantial amounts of sponsored TBA even without the use of overt coercive tactics" (A.R. 64). For, as the court of appeals stated (A.R. 3295), because of the Atlantic "dealers' economic dependency upon the oil company * * * recommendation is tantamount to command. Covert practices are as efficient as overt action. Sophisticated methods of pressuring the dealers into carrying sponsored TBA are as effectual as express covenants and open threats." Cf. *American Column & Lumber Company* v. *United States*, 257

[stocks of Goodrich tires and batteries] as fast as you can * * *.

Q. And after that you never purchased Goodrich tires or batteries?

A. No.

In *United States* v. *Sun Oil Co.*, 176 F. Supp. 714, 719 (E.D. Pa.) the court stated: "Displaying a product and advertising it at service stations facilitates its sale. Hence, inconspicuous, undisplayed and non-advertised products cannot be effectively sold at such stations. Compelling the removal of signs displaying the fact that a particularly branded product is for sale at a dealer's station at least retards its sale, since motorists will not, as a rule, drive from station to station for the purpose of inquiring whether the brand of motor oil or TBA of their preference is being sold on the premises."

[25] As Mr. Justice Jackson has pointed out "[n]o retailer * * * can * * * remain in business if he does not always, and not just intermittently, have gas to sell" (*Standard Oil Co.* v. *United States*, 337 U.S. 293, 323) (dissenting opinion).

U.S. 377, 414; *Ford Motor Co.* v. *United States,* 335 U.S. 303, 323-326 (Mr. Justice Black, dissenting).

But any possible doubt as to Atlantic's power to compel its dealers to buy sponsored TBA is dispelled by the very fact that Goodyear and Firestone were willing to pay Atlantic substantial sums in return for the latter's services in "promoting" such purchases. The tire companies would not have paid commissions to Atlantic amounting to almost $5 million from 1950 to 1956 (A.R. 76) unless they were satisfied that Atlantic in fact was able to require its dealers to purchase sponsored TBA. As we now show, the actual operating practices and results under the sales commission contracts leave no doubt that Atlantic can, and did, require its dealers to purchase substantial quantities of Goodyear and Firestone TBA.

2. *In performing the sales commission agreements, Atlantic exercised its power over its dealers to require them to purchase substantial amounts of sponsored TBA*

As soon as Atlantic signed the sales commission agreements, it took vigorous action to perform its duty to promote the sale of sponsored TBA. It informed its dealers of the new plan;[26] held meetings with them at which its representatives joined with those of Goodyear and Firestone in explaining the program and urging the dealers to adopt it;[27] and

[26] A dealer described Atlantic's letter announcing the new plan as stating that "after a certain time, that Goodyear would be our distributor for accessories * * * [a]nd tires and batteries" (A.R. 1737).

[27] An Atlantic dealer described what happened at one meeting as follows (A.R. 182):

Q. Mr. Chambers, referring back to the time, to the dealer meeting when the switch-over to Goodyear TBA

had its salesmen join with tire company representatives in calling upon the dealers and urging them to shift to the new brands. Products of other manufacturers in the hands of Atlantic dealers were relabelled to bear the Goodyear or Firestone names, and defective Lee tires and Exide batteries were replaced by Goodyear and Firestone brands. During 1951 and 1952 Atlantic limited the use of credit cards, which accounted for as much as 25 percent to 35 percen of a dealer's business, to sponsored TBA; and even after that time, some dealers still believed that this limitation was still in effect. See *supra*, pp. 15–18, 24.

Under its leases and contracts with its dealers, Atlantic has broad control over the advertising displayed at the service stations. See *supra*, pp. 11, 42. Atlantic assisted Goodyear and Firestone in substituting their advertising for that of products previously featured by the dealers, and did so even at stations where the dealers wished to continue to advertise the competing brands. See *supra*, pp. 17, 23–24. Goodyear sent Atlantic the names of dealers who refused to permit the installation of Goodyear advertising, and Atlantic forwarded these names to its district offices for "appropriate action." The effectiveness of this action was demonstrated in Atlantic's Philadelphia and South Jersey districts, where 46 dealers who had refused to permit Goodyear advertising accepted it

line was announced, were you given any choice as to the brand of TBA that would be carried by Atlantic?

A. No there was no choice; I mean the company said that they were going from one product which would be Lee and Exide, over to full Goodyear.

after Atlantic referred the matter to the district offices (A.R. 316–317, 2763–2787).

In view of the pressures to which Atlantic subjected its dealers and their awareness of the possible consequences of opposition (see *supra*, pp. 38–44), it is hardly surprising that the program was highly successful in transferring to Goodyear and Firestone most of the TBA business that Atlantic itself previously had handled under the purchase-resale plan for Lee Tires, Exide Batteries and other products. A 1948–1949 Atlantic survey of dealer TBA preferences showed that 67 percent of its dealers preferred Lee tires and 79 percent preferred Exide batteries; and that only 11 percent preferred Goodyear tires and only 4 percent preferred Firestone tires. See *supra*, p. 12. Despite these strong dealer preferences for Lee and Exide, by October, 1951—only 7 months after the new plans had gone into effect—Goodyear had signed contracts with 98 and 96 percent, respectively, of Atlantic's outlets in two of the three marketing areas assigned to Goodyear (A.R. 2841). In that same year, Lee and Exide lost approximately 75 percent of their former Atlantic business (CX 292A; A.R. 3074, CX 311, 3075–3076). By 1952, the first full year under the sales commission plan, total TBA sales by Goodyear and Firestone to Atlantic outlets were 40 percent greater than Atlantic's own TBA sales had been in 1949, the last full year in which Atlantic operated its purchase-resale plan (A.R. 76–77).

This striking shift in a short period of the dealers' purchases from Lee and Exide, the brands for which

they previously had shown a strong preference, to Goodyear and Firestone, the brands they had disfavored, is the clearest evidence of how effectively Atlantic was able to use its economic power over its dealers to compel them to purchase sponsored TBA.[23] Cf. *Northern Pacific R. Co.* v. *United States,* 356 U.S. 1, 7–8; *Lessig* v. *Tidewater Oil Co.,* 327 F. 2d 459, 470 (C.A. 9), certiorari denied, 377 U.S. 993.

Atlantic has continued its vigorous "sponsorship" of Goodyear and Firestone products, and has used various techniques to insure that its dealers handle those brands rather than competing ones. Atlantic's program for selecting, training and installing new dealers emphasizes that it wants its stations to carry

[23] Atlantic asserts (Br. pp. 12, 15, 45–46) that its dealers bought sponsored TBA because Lee tires lacked public acceptance. To support this statement it relies on the testimony of two Atlantic officials and one dealer. One of those officials, the vice-president in charge of marketing, stated that the Lee product had "varied acceptance," that it was quite successful in the Philadelphia area, and that Exide batteries had national acceptance and that Atlantic did not drop that product for such failing (A.R. 2302). The record indicates the Lee tire has certain advantages over Goodyear: it provides a road hazard guarantee, while Goodyear does not (A.R. 370, 437, 1580; CX 9, A.R. 2353; cf. CX 108A–J, A.R. 2628); it is more profitable for dealers (A.R. 370, 1598; G.R. see A.R. 1580; CX 9, A.R. 2353; CX 108 A–J, A.R. 2628); Lee provides better terms on advertising (A.R. 373, 443–446); and some dealers were dissatisfied with Goodyear service and adjustments (A.R. 652, 654, 1633, 1738–1739, 2148). Atlantic's suggestion (Br. p. 25) that Lee rejected an opportunity to enter into a sales commission contract with it is refuted by the document cited (CX 280, A.R. 3005), which shows that Atlantic offered Lee only the opportunity to continue purchase-resale arrangements in any areas to which the sales commission plan might not be made applicable.

only sponsored TBA, and assures that the dealers begin operations with the sponsored products. Atlantic salesmen often accompany Goodyear and Firestone representatives when the latter call on Atlantic accounts. Atlantic salesmen themselves solicit orders for sponsored TBA, encourage its purchase to meet a specified quota, criticize the purchase of unsponsored goods and direct dealers to get rid of such goods and not to display them. Atlantic controls display advertising at its stations to feature sponsored TBA, and prevents the display or advertising of other goods. Indeed, Atlantic salesmen even have resorted to threats of cancellation or nonrenewal of licenses to enforce the purchase of sponsored TBA. These and other acts which Atlantic has done in the performance of its contracts with Goodyear and Firestone are detailed in the Statement, *supra,* pp. 19–25.

Although Atlantic informed its dealers that they had a "free choice" in selecting TBA and were not required to buy sponsored products (see Atlantic Br. pp. 17–20, Goodyear Br. p. 13), Atlantic's actual practice refutes this claim. There were a number of instances in which Atlantic salesmen resorted to direct threats to cancel or not to renew leases in order to force a dealer to buy sponsored TBA (see the Statement, *supra,* pp. 24–25). In addition, the record shows that despite what Atlantic *said,* what Atlantic *did* led dealers to understand and believe that they

were required to purchase substantial amounts of sponsored TBA.[29]

Dealer Matthews stated that he did not carry unsponsored TBA because "I didn't want my lease cancelled. I wanted my lease renewed when it terminated" (A.R. 438–439); and because "* * * I wanted to stay a dealer and knew I couldn't [carry unsponsored TBA]" (A.R. 445). Dealer Balloran said (A.R. 659):

> * * * You couldn't sell anything on that station except what you bought from Goodyear or DuPont or an Atlantic dealer can't sell anything but Atlantic products and the one that its representatives are still supplying. When I went to buy a Firestone or Goodrich tire or anything like that, that was against the rules of that station, I know that. Anybody knows that. The salesman knew it. That's why I left the station.

Dealer Sullivan stated that he discontinued selling unsponsored products "Because I was afraid that if I rubbed Atlantic the wrong way by continuing to sell them, that I may be in their disfavor, and I had

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[29] An Atlantic dealer described what happened when he pointed out to his salesman that Atlantic had stated that dealers were not required to purchase sponsored TBA (A.R. 826):

Q. Did you ever discuss that [no forcing] letter with salesman Way?

A. Yes I did.

Q. What did you state to salesman Way?

A. I said "Bill, does that letter mean what it says?" and he said, "You try it and you will find out". That was the answer I received.

Q. So you continued to purchase Goodyear TBA?

A. That's right.

been—at the time the discussion came up about the batteries, it was my—I guess it was my first warning that the company expected me to buy Firestone products and that if I did not buy Firestone products, chances were that my lease would not be renewed" (A.R. 906-907). Dealer Hawes said that "* * * it was more or less I think understood" that Atlantic outlets had to carry sponsored TBA (A.R. 937).

The testimony of suppliers also showed that the dealers believed that they had to purchase sponsored TBA. Several wholesalers said that their attempts to sell unsponsored TBA to Atlantic dealers met with comments such as these: "Sorry Glenn, but I have to reserve this for Ed Parris [a Goodyear supply point]. You understand the situation. I am in an Atlantic station. I must buy from an Atlantic TBA distributor" (A.R. 237); "Glenn, I am going to have to stop buying from you. I have been warned that if I don't, I am going to be removed from this station. They are going to give me the ax" (A.R. 239); "Joe, I would like to buy the batteries from you, but you know what I have been running into and what every Atlantic man has been running into. I cannot put anything but a Goodyear battery in here" (A.R. 704-705); "Joe, I'd be glad to buy them on a fill-in basis, but you know I cannot put anything in here but Goodyear tires and Goodyear tubes" (A.R. 708); "What do you want, the roof to cave in on me? I would lose my lease immediately" (A.R. 557); "I wish I could buy those deals, but I am not allowed to" (A.R. 556). Other explanations which wholesalers received from

dealers for their refusal to purchase non-sponsored TBA included:

"The same reason that most of these other fellows have given us whenever they have stopped buying any merchandise from us, pressure from Atlantic" (A.R. 699); "As one dealer told me, that he was to save it for the Atlantic salesman the next time he came around" (A.R. 383); "* * * at that time he told me that he is going to handle Firestone tires because the oil company has a tie-in with them" (A.R. 1083); "He said it is awful tough for him to buy any products except those he is supposed to buy through the oil company" (A.R. 1113); "He said he would no longer be able to buy merchandise from me; that this Atlantic salesman was applying pressure; that he would have to stock merchandise bought from them only" (A.R. 1157); "They told me then that Atlantic Refining Company had given them some additional outlets in their territory and they were practically compelled to go along with the Atlantic proposition program" (A.R. 817); "* * * and they told him he should stick with Firestone and he wouldn't buy them [unsponsored batteries]. I never did sell him" (A.R. 971): "He said he was mostly obligated to buy his TBA items from Firestone" (A.R. 1132).

In the face of this kind of pressure, it was hardly surprising that Atlantic's efforts to require its dealers to purchase Goodyear and Firestone TBA were highly successful. The extent of that success is shown by the fact that in the first six years of the program, each of those companies had total TBA sales to Atlantic outlets of more than $25 million

(A.R. 76). This success is not surprising in view of the substantial evidence in the record that Atlantic dealers believe—as Atlantic obviously wants them to—that, if they wish to remain in Atlantic's good graces, they are required to purchase their TBA from Goodyear and Firestone. See *supra,* pp. 26–27, 49–51. As the court of appeals stated (A.R. 3293), "the Commission, in evaluating the evidence, correctly found that if a dealer wishes to continue in good standing with the company and retain his lease or contract, it is advantageous that he carry sponsored TBA."

B. THE SALES COMMISSION PLAN INJURED COMPETITION IN THE DISTRIBUTION OF TBA

The Commission found that the sales commission plan injured competition at all three levels of the TBA industry: manufacturing, wholesaling, and retailing (A.R. 113–129). The court of appeals upheld the Commission's findings of such competitive injury, and specifically ruled that "the record substantiates the Commission's finding that suppliers of TBA competing with Goodyear and Firestone are substantially foreclosed from selling their products to Atlantic dealers. Atlantic's service station market is fenced off so as to make it unavailable to both manufacturers and wholesalers of competing brands" (A.R. 3296–3297).

As set forth in the Statement, *supra,* pp. 25–28, the record fully supports the Commission's conclusions on injury to competition. It shows that small manufacturers who either do not have distribution points throughout Atlantic's territory or do not have a full

line of TBA, are unable to sell to Atlantic because the latter insists on dealing with a single supplier who has an extensive distribution system and handles a complete TBA line—even though the smaller manufacturers' products have good consumer acceptance in the areas where they are sold. Wholesalers of unsponsored TBA have been precluded from selling their products to Atlantic dealers—not because the latter in the exercise of independent business judgment prefer Goodyear and Firestone, but because they believe that they run the risk of losing their leases or contracts if they buy other products. Indeed, many of such wholesalers do not even attempt to solicit business from many Atlantic dealers, since they have learned that such endeavors are fruitless. Moreover, even wholesalers of sponsored products cannot sell to Atlantic dealers unless they are authorized supply points for such dealers, even though such wholesalers offer lower prices than the supply points. Finally, the division of the Atlantic marketing territory between Goodyear and Firestone eliminates competition between these two major firms in selling TBA to Atlantic.

The market from which this competition was foreclosed was a substantial one. During the first six years of the Atlantic sales commission plans, Goodyear and Firestone together sold it more than $50 million worth of TBA; in 1955 (the last full year for which the record contains data) their total TBA sales to Atlantic were more than $11 million (A.R. 76, 78). In cases involving the validity of tying agreements under Section 1 of the Sherman Act, which are *per se*

illegal if they restrain a "not insubstantial" volume of commerce, far smaller amounts have been deemed substantial. See *United States* v. *Loew's, Inc.*, 371 U.S. 38, 49 (25 tying contracts of six companies, involving \$60,000 to \$2½ million each); *International Salt Co.* v. *United States*, 332 U.S. 392, 395 (\$500,000 annually); *United States* v. *Richfield Oil Corp.*, 99 F. Supp. 280, 285–286 (S.D. Cal.), affirmed, 343 U.S. 922 (\$3,600,000 of TBA).

C. THE COMMISSION CORRECTLY HELD THAT THE SALES COMMISSION PLAN IS AN UNFAIR METHOD OF COMPETITION BECAUSE IT CAUSES ATLANTIC TO USE ITS ECONOMIC POWER OVER ITS RETAIL GASOLINE DEALERS TO RESTRAIN COMPETITION IN TBA

1. *Section 5 of the Federal Trade Commission Act gives the Commission broad discretion to define unfair methods of competition, and at a minimum the Commission may prohibit conduct that has the same kind of anticompetitive effect as violations of the Sherman and Clayton Acts*

When Congress in 1914 enacted the prohibition in Section 5 of the Federal Trade Commission Act against "unfair methods of competition," it intentionally refrained from defining the term so that the Commission might develop the meaning with experience to meet changing competitive conditions. As the Senate Committee Report explained (S. Rep. No. 592, 63d Cong., 2d Sess., p. 13):

> The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine

what practices were unfair. It concluded that the latter course would be the better, for the reason, as stated by one of the representatives of the Illinois Manufacturers' Association, that there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others.

* * * * *

* * * The committee was of the opinion that it would be better to put in a general provision condemning unfair competition than to attempt to define the numerous unfair practices * * *.

See also H.R. Rep. No. 1142, 63d Cong., 2d Sess., pp. 18–19 (conference report), where the House managers stated:

* * * The most certain way to stop monopoly at the threshold is to prevent unfair competition. This can best be accomplished through the action of an administrative body of practical men thoroughly informed in regard to business, who will be able to apply the rule enacted by Congress to particular business situations, so as to eradicate evils with the least risk of interfering with legitimate business operations.

It is impossible to frame definitions which embrace all unfair practices. * * * It is also practically impossible to define unfair practices so that the definition will fit business of every sort in every part of this country. Whether the competition is unfair or not generally depends upon the surrounding circumstances of the particular case. * * *

This Court has recognized that Congress left it to the Commission to give precise content to the concept of "unfair method of competition." Thus, in *Federal Trade Commission* v. *Cement Institute,* 333 U.S. 683, the Court stated (p. 708–709):

> * * * This general language [unfair method of competition] was deliberately left to the "commission and the courts" for definition because it was thought that "There is no limit to human inventiveness in this field"; that consequently, a definition that fitted practices known to lead towards an unlawful restraint of trade today would not fit tomorrow's new inventions in the field; and that for Congress to try to keep its precise definitions abreast of this course of conduct would be an "endless task." See *Federal Trade Commission* v. *R. F. Keppel & Bro.,* 291 U.S. 304, 310–312, and congressional committee reports there quoted.

Similarly, in *Federal Trade Commission* v. *Motion Picture Advertising Service Co.;* 344 U.S. 392, 394, the Court noted: "Congress advisedly left the concept flexible to be defined with particularity by the myriad of cases from the field of business."

In the Federal Trade Commission Act Congress thus adopted the legislative principle, now thoroughly familiar, of enunciating broad but necessarily generalized standards, and leaving it to the specialized agency that enforces the statute to particularize those standards through their application to individual factual situations. Cf. *National Labor Relations Board* v. *Hearst Publications,* 322 U.S. 111, 130; *Gray* v. *Powell,* 314 U.S. 402, 411–412.

An important feature of this type of legislation is that great weight is accorded to the decisions of the expert body in performing its function of applying the statutory standards to particular situations. *Hearst, supra,* at 130–131; *Gray, supra,* at 412. In *Hearst* the Court stated (p. 131) that "where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited. * * * [T]he Board's determination that specified persons are 'employees' under this Act is to be accepted if it has 'warrant in the record' and a reasonable basis in law."

In the *Cement Institute* case, *supra,* this Court specifically applied that rule when it

> sustain[ed] the Commission's holding that concerted maintenance of the basing point delivered price system is an unfair method of competition prohibited by the Federal Trade Commission Act. *In so doing we give great weight to the Commission's conclusion, as this Court has done in other cases. Federal Trade Comm'n* v. *R. F. Keppel & Bro.,* 291 U.S. 304, 314; *Federal Trade Comm'n* v. *Pacific States Paper Trade Assn.,* 273 U.S. 52, 63. In the *Keppel* case the Court called attention to the express intention of Congress to create an agency whose membership would at all times be experienced, so that its conclusions would be the result of an expertness coming from experience. We are persuaded that the Commission's long and close examination of the questions it here decided has provided it with precisely the experience that fits it for per-

> formance of its statutory duty. [333 U.S. at 720, emphasis supplied.]

Furthermore, "[i]t has long been recognized that there are many unfair methods of competition that do not assume the proportions of Sherman Act [or Clayton Act] violations." *Federal Trade Commission* v. *Cement Institute,* 333 U.S. at 694; *Federal Trade Commission* v. *Motion Picture Advertising Service Co.,* 344 U.S. 392, 394–395. Conduct may constitute an unfair method of competition if it "runs counter to the public policy declared" in those Acts (*Fashion Originators' Guild* v. *Federal Trade Commission,* 312 U.S. 457, 463).

As the case comes before this Court, therefore, the question is relatively narrow: whether the Commission's holding that the sales commission plan is an unfair method of competition "has 'warrant in the record' and a reasonable basis in law" (*National Labor Relations Board* v. *Hearst Publications, supra,* 322 U.S. at 131). As we now show, it has both. It has "warrant in the record" because the Commission's findings, which the court of appeals held were supported by substantial evidence, show that the plan resulted in the use of Atlantic's economic control over its dealers to foreclose competition in a substantial segment of the TBA market. It has "a reasonable basis in law" because the plan had the same kind of adverse effect on competition as an illegal tying agreement, and therefore properly was held to be an unfair method of competition.

2. The sales commission plan, by utilizing Atlantic's controlling economic power over its gasoline dealers to preempt for Goodyear and Firestone a substantial TBA market, causes the same kind of competitive injury as an illegal tying agreement

The Commission found—and the court of appeals upheld the findings—that the sales commission plan injured competition in the following respects, among others:

(a) Manufacturers and wholesalers of competing brands of TBA, and Goodyear and Firestone wholesalers who were not authorized supply points under the plan, were foreclosed from a significant market.

(b) Dealers were denied freedom of choice to select brands to sell and sources from which to buy.

(c) Goodyear and Firestone were each foreclosed from access to Atlantic outlets in the areas assigned to the other, and to that extent competition between them was eliminated.

These restraints upon competition were the result of the basic character of the sales commission plan. Under it Atlantic undertook to use its economic power in the retail gasoline business, stemming from its control over its dealers, to require them to purchase sponsored TBA. Although Atlantic usually did not explicitly require its dealers to purchase Goodyear and Firestone TBA as a condition to becoming or remaining an Atlantic dealer (but see the numerous instances where dealers were actually threatened with cancellation or non-renewal of leases or contracts unless they bought sponsored TBA, *supra*, pp. 24–25), Atlantic's sponsorship of those companies' products had that effect in practical operation. For, as the court of ap-

peals correctly pointed out (A.R. 3295), in the setting of the "dealers' economic dependency upon the oil company * * * recommendation is tantamount to command. Covert practices are as efficient as overt action. Sophisticated methods of pressuring the dealers into carrying sponsored TBA are as effectual as express covenants and open threats." Considering the vigor and thoroughness with which Atlantic hammered home its desire that its dealers handle sponsored TBA (see *supra,* pp. 15–18, 19–25), it was hardly surprising that Goodyear and Firestone quickly took over, and apparently retained, virtually the entire TBA market that Atlantic formerly had controlled through its direct sales to its dealers (see *supra,* pp. 18–19, 25–26, 46).

The net effect of the sales commission plan upon competition, therefore, was as though Atlantic had agreed with Goodyear and Firestone that it would require its dealers to purchase TBA. For that arrangement would cause the same major restriction upon competition that the present plans effect: the foreclosure of competing TBA manufacturers and distributors from a major segment of the substantial Atlantic TBA market—a segment that during the first six years of the plans' operation amounted to approximately $50 million.

If the sales commission plan had provided for express tying agreements between Atlantic and its dealers, there would be no doubt that such agreements, covering $50 million worth of commerce, would be illegal *per se* under Section 1 of the Sherman Act, *United States* v. *Loew's,* Inc., 371 U.S. 38; *Northern*

Pacific Ry. Co. v. *United States,* 356 U.S. 1; *United States* v. *Richfield Oil Corp.,* 99 F. Supp. 280 (S.D. Calif.), affirmed, 343 U.S. 922. An agreement requiring Atlantic to engage in such practices obviously would itself unreasonably restrain trade (*Motion Picture Patents Company* v. *Universal Film Manufacturing Company,* 243 U.S. 502; *United States* v. *Bausch & Lomb Co.,* 321 U.S. 707) and the Commission certainly could condemn such contract as an unfair method of competition (*supra,* p. 58).

The basic vices of tying agreements which this Court described in *Northern Pacific Ry. Co.* v. *United States,* 356 U.S. 1, 6, are equally applicable to the sales commission plans involved in the present cases: "They deny competitors free access to the market for the tied product [TBA], not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products." See, also, *United States* v. *Loew's, Inc.,* 371 U.S. 38, 45. The Commission's decision to treat as an unfair method of competition the present type of plan, which does not have an express tying requirement but nevertheless accomplishes the same result and causes the same injury to competition as if it did, surely had a "reasonable basis in law" (*National Labor Relations Board* v. *Hearst Publications, supra*).[30]

[30] Petitioners contend (Atlantic Br. pp. 56–58, Goodyear Br. p. 41) that the court of appeals, insofar as it relied on a tying theory, decided the case on a different basis than the Commission, contrary to the rule of *Securities and Exchange Commis-*

The petitioners contend (Atlantic Br. pp. 51–56; Goodyear Br. pp. 31–36), however, that the Commission could not rest its conclusion that the plan is an unfair method of competition upon the fact that it foreclosed competition from a substantial market ($50 million worth of TBA during a six-year period), but was required to make an elaborate economic analysis into such questions as the percentage of the total TBA market that the Atlantic business represented, the effect of the plan on that broader market, the avail-

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sion v. *Chenery Corp.*, 318 U.S. 80. Citing the following statement in the Commission's opinion—"But we do not rest our decision on a mechanical application of the rule of the *Northern Pacific* and *Osborn* cases" (A.R. 124)—they contend that the Commission thereby disavowed any reliance on a tying theory.

Petitioners misread the Commission's opinion. All that the Commission said in the quoted sentence was that it would not rest on the rule that tying agreements are illegal *per se* "whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected" (*Northern Pacific R. Co.* v. *United States*, 356 U.S. 1, 6. Rather, as it stated in the third sentence following that quoted, it would make "an evaluation of competitive effects resulting from the sales commission method of distributing TBA used by these respondents."

While the Commission thus eschewed a "mechanical application" of the rule governing tying agreements, it repeatedly recognized the analogy between such agreements and the sales commission plan. Indeed, following the sentence that petitioners quote, the Commission summed up the basic vice of the sales commission plan in words that plainly reflected a tying theory: "We believe that the sales commission method of distributing TBA presents a classic example of the use of economic power in one market (here, gasoline distribution) to destroy competition in another market (TBA distribution)" (A.R. 128–129).

ability of other markets to competing TBA manufacturers and distributors, etc. To prove that a tying agreement is illegal, however, the only market impact that need be shown is that "a 'not insubstantial' amount of interstate commerce is affected" (*Northern Pacific, supra; International Salt Co.* v. *United States*, 332 U.S. 392); there is no occasion to make "a full-scale factual inquiry into the scope of the relevant market for the tying product and into the corollary problem of the seller's percentage share in that market" (*United States* v. *Loew's Inc.*, 371 U.S. 38, 45, fn. 4). The reason for this rule is that because tying agreements are inherently anticompetitive the mere fact that they cover a significant volume of commerce itself establishes that they injure competition. Since, as we have shown, the sales commission plan has the same anticompetitive effects as a tying agreement, the Commission properly applied the standards governing the latter in determining the validity of the former.[31]

Petitioners also argue (Atlantic Br. pp. 46-49; Goodyear Br. pp. 23-27) that the Commission was

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[31] While petitioners rely upon *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320, that case involved a requirements contract. This Court has distinguished between tying agreements, which are "inherently anticompetitive" and serve "hardly any purpose beyond the suppression of competition", and requirements contracts, which are governed by a less stringent rule (*Brown Shoe Co.* v. *United States*, 370 U.S. 294, 330-331; *Standard Oil Co.* v. *United States*, 337 U.S. 293, 305, 307). In *Standard Oil*, the Court specifically noted that an oil company's exclusive supply arrangements with its dealers for TBA (as distinct from gasoline) "should perhaps be considered * * * tying rather than requirements agreements" (337 U.S. at 305, fn. 8).

required to balance the asserted benefits of the sales commission plan against its competitive evils before condemning it as an unfair method of competition. As a corollary, they urge (Atlantic Br. pp. 42–46, Goodyear Br. pp. 36–37) that the Commission acted arbitrarily in prohibiting the sales commission plan while simultaneously approving the purchase-resale method of TBA distribution (under which Atlantic itself purchases the products and then resells them to its dealers), since the latter method has the same anticompetitive effects and also is a less effective method of distribution for Atlantic and other regional oil companies who are not large enough to maintain a comprehensive network of distribution outlets for TBA.

The latter argument rests on an erroneous factual premise. In prohibiting the sales commission plan, the Commission did not approve the purchase-resale method. The Commission's complaint challenged only the sales commission system, not the purchase-resale plan (A.R. 5–12), and its lengthy opinion stressed at several points that only the legality of the former method of distributing TBA was at issue (*e.g.*, A.R. 61–62, 124). In their appeal from the hearing examiner's decision, counsel supporting the complaint did seek an order enjoining Atlantic from purchasing TBA for resale to its wholesalers or retailers (A.R. 64), but this was obviously sought as relief that would be appropriate if the Commission reversed the examiner and condemned the sales commission plan. While the Commission did not grant

this broader relief sought by the staff,[32] such action merely represented a determination that a ban on use of the purchase-resale plan was not a proper remedy to cure the violation found. It cannot fairly be interpreted as an affirmative adjudication that the purchase-resale plan itself, whose substantive validity had not been challenged in the proceeding, was valid. Nor can the Commission be deemed to have validated the purchase-resale plan because it indicated (A.R. 127–128) that this plan was likely to have less severe anticompetitive consequences for smaller TBA manufacturers than the sales commission program it condemned.

Atlantic's argument that the sales commission plan is more economical for it than other systems of TBA distribution is no ground for invalidating the Commission's decision. In view of the demonstrated anticompetitive effects of the plan, it cannot be justified because it may be "beneficial to [Atlantic's] business" by reducing costs. *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1, 6–7; *United States* v. *Loew's, Inc.*, 371 U.S. 38, 51–52. Indeed, the costs of Atlantic's TBA distribution program are properly viewed as part of the costs of its petroleum business. Petitioners state (Atlantic Br. pp. 11–12; Goodyear Br. p. 11) that Atlantic's receipts from its TBA contracts with Goodyear and Firestone are less than one-quarter of one percent of its total revenues from

[32] The provisions of the cease and desist order applicable to Atlantic prohibit it from entering into contracts, or using various devices, to promote the sale of TBA products to Atlantic outlets by any TBA distributor or marketer "other than The Atlantic Refining Company" (A.R. 132–133).

petroleum products. Atlantic apparently makes no profit on those sales commission contracts, since its receipts therefrom just about cover its expenses in sponsoring Goodyear and Firestone TBA (A.R. 2298).[33] It asserts (Atlantic Br. pp. 10–12; A.R. 1443; see A.R. 1444) that it seeks to develop the marketing of TBA by its dealers to strengthen them and thereby to increase its sales of gasoline and other petroleum products. In fact, TBA sales are so important to gasoline sales that Atlantic officials have stated that they will continue to train their dealers in TBA operations even if the company were not to be paid therefor (A.R. 1499–1500, 1819–1820; see A.R. 1442–1443).[34] In short, Atlantic conducts its TBA operations primarily as a necessary appendage of its petroleum business, and it cannot justify the restrictive consequences of the former on the ground that they

[33] While Atlantic disclaims any interest in revenues from the sales commission plan, it should be noted that recouping the costs of its TBA program represents a considerable saving of money for Atlantic over the previous purchase-resale program (Atlantic Br. pp. 13–15). Moreover, once the sales commission system was launched, the oil company had the strongest financial motive to increase the sales subject to commission (see *Osborn* v. *Sinclair Refining Co.*, 286 F. 2d at 834). The record shows that Atlantic sought to increase the number of items on which it receives commissions (A.R. 2377, 2436–2437; and see R. 2608).

[34] If Atlantic dealers were to deal independently with TBA manufacturers and wholesalers (see text, *infra*, pp. 67–68), some of the costs would be borne by the latter instead of by Atlantic. The record shows that the tire companies circulate advertising material that tells dealers how much and what kind of products to purchase as well as how to display such products (CX 247B, A.R. 2935–2962).

are outweighed by a reduction in the operating costs of the latter.

Contrary to petitioners' apparent assumption, the sales commission and purchase-resale plans are not the only alternatives available for distributing TBA through oil company dealers. Another method would be to permit Atlantic dealers to make an independent decision as to TBA, thus allowing them to deal directly with the TBA wholesaler of their choice. The record shows that there are numerous independent TBA wholesalers desirous of selling to Atlantic stations and conveniently located for that purpose.[35] These wholesalers carry every type and brand of TBA product, including Goodyear and Firestone.[36] They call on their customers regularly, possess fully adequate delivery equipment, and give excellent service[37]—indeed, sometimes better than Goodyear or Firestone supply points (A.R. 652–653). Their prices are competitive:[38] they sometimes charge less for Goodyear, Firestone and competing products than the authorized supply points charge for sponsored prod-

[35] One supplier estimated that there are more than 60 TBA suppliers in his marketing area (A.R. 1068). The large number of aggrieved wholesalers who testified for the Commission itself indicates the ready availability of numerous sources of supply.

[36] A.R. 225, 379–380, 412–413, 573–574, 618, 669, 678, 691, 725, 741, 755, 845, 876–877, 972, 974, 1048–1049, 1067, 1077, 1117, 1128, 1152, 1156.

[37] A.R. 199–200, 225, 226, 380, 381, 413, 574, 666, 678, 692, 693, 725, 726, 746, 755, 769, 846, 878, 1050, 1067, 1078, 1085, 1117, 1683.

[38] A.R. 222, 559, 634, 643–644, 652, 692, 726, 847, 878, 1068, 1085, 1175, 1683, 2135.

ucts (A.R. 559, 634, 643–644, 652, 1085, 1175, 1683, 2134–2135). And, in addition to being served by wholesalers, Atlantic dealers can also be served by stores owned by TBA manufacturers, and by local company branches (A.R. 394, 1175, 2125, 2126, 3008–3009, 3215; G.R. 1294).

Atlantic has a legitimate business interest in assuring that its dealers carry TBA of high quality, and know how to stock, display and use it. But this interest can be protected by requiring the dealers to meet certain standards in conducting their TBA business (*Standard Oil Co.* v. *United States,* 337 U.S. 293, 306; *International Salt Co.* v. *United States,* 332 U.S. 392, 397–398; *Osborn* v. *Sinclair Refining Co.,* 286 F. 2d 832, 834 (C.A. 4), certiorari denied, 366 U.S. 963). If Goodyear and Firestone TBA are "in fact superior to that of [their] competitors, [Atlantic dealers] will presumably choose it anyway" (*Standard Oil Co.* v. *United States,* 337 U.S. at 306; *Northern Pacific Ry. Co.* v. *United States,* 356 U.S. at 9). Atlantic officials have recognized, however, that other brands of TBA are as good as Goodyear or Firestone (see A.R. 1493–1496, 1812–1813, 1815); see also *Osborn* v. *Sinclair Refining Co.,* 286 F. 2d at 834.[39] Atlantic cannot,

[39] Although petitioners and the *amici curiae* claim that the sales commission plan is essential effectively to meet their dealers' TBA needs, they assert at the same time that their dealers have and exercise free choice, and the *amicus* Champlin contends that unsponsored TBA constitutes over 70 percent of the total sold by their dealers. We fail to understand how the sales commission program can, at one and the same time, be both crucially necessary and unsuccessful. In any event, the claim of Atlantic dealers' free choice is refuted by the record (*supra*, pp. 24–25, 48–51).

through the sales commission plan, deny its dealers the freedom of choice that the antitrust laws are designed to protect.

II

THE COMMISSION'S ORDER PROPERLY PROHIBITS ATLANTIC AND GOODYEAR FROM PERFORMING THEIR SALES COMMISSION AGREEMENT OR FROM ENTERING INTO OR PERFORMING ANY SIMILAR AGREEMENT WITH ANY TBA OR OIL COMPANY, RESPECTIVELY

A. THE COMMISSION, UPON HOLDING THAT THE ATLANTIC-GOODYEAR AGREEMENT WAS AN UNFAIR METHOD OF COMPETITION, PROPERLY ENJOINED ITS PERFORMANCE

The complaint charged that the sales commission agreement between Atlantic and Goodyear (as well as the former's similar agreement with Firestone, and the latter's agreement with other oil companies) constituted unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act (Pars. 7–12, A.R. 8–12). The Commission specifically held (A.R. 64) that Atlantic's exercise of its economic power over its wholesale and retail distributors "through the use of the sales commission plan in favor of Goodyear constitutes an unfair method of competition," and it characterized the "sales commission method of distributing TBA" as a "classic example of the use of economic power in one market * * * to destroy competition in another market * * *" (A.R. 128–129). In short, the Commission held that it was the sales commission agreement itself, and not merely the steps taken to implement it, which constituted an unfair method of competition.

The Commission's order prohibits both Atlantic and Goodyear from performing the illegal agreement (A.R. 131–134). The literal terms of the statute justify the order. Section 5 (*supra*, p. 4) directs the Commission, upon finding that any person has used any unfair method of competition, to order him "to cease and desist from using such method of competition * * *." The Commission found that Atlantic and Goodyear had used an unfair method of competition, namely, the sales commission plan, and its order is directed against the precise violation found, as the statute contemplates.

The Commission was fully justified in prohibiting the sales commission plan itself rather than attempting to change the basic relationship between Atlantic and its dealers or to interdict only particular misconduct in executing the agreement. For, as we have shown, the crux of the illegality of the Atlantic-Goodyear agreement is that it induces, if not requires, Atlantic to engage in a course of conduct which, because of the oil company's power over its dealers, has the effect of compelling them to purchase sponsored TBA. The Commission properly viewed everything that Atlantic did under the sales commission plan as a single integrated program, since these were the steps by which Atlantic satisfied its contractual obligation to sponsor and promote Goodyear products, and for which Goodyear undertook to pay it a substantial commission. These steps included the various activities described at length in the Statement (*supra*, pp. 16–18, 19–25), such as promotion of sponsored TBA at

dealer-training schools and dealer meetings; giving Goodyear advance notice of the opening of new stations; refusal to permit dealers to display advertising for nonsponsored products; joint calls on dealers by Atlantic and Goodyear salesmen; solicitation of TBA orders by Atlantic salesmen; limitations on the use of credit cards to purchase non-sponsored products; and finally, threatening dealers who refused to purchase Goodyear TBA with cancellation or non-renewal of their leases or contracts. In sum, Atlantic marshaled the full measure of its economic power over its dealers to carry out a pressure campaign designed to get them to handle Goodyear and Firestone products and, because of the extent of that power, the campaign was highly successful.

In these circumstances, if the plan itself were to be permitted to continue, its anticompetitive effects could be dissipated only through some fundamental change in the relationship between Atlantic and its dealers that would eliminate the former's power to coerce them to buy TBA. The Commission noted (A.R. 100) that the overt acts of coercion which Atlantic committed against its dealers were "mere symptoms of a more fundamental restraint of trade inherent in the sales commission system itself." Elimination of that "inherent" restraint is the only remedy that would effectively cure the system's anticompetitive effects.

A prohibition against the use of a particular method of distributing TBA, which is a relatively minor portion of Atlantic's business, obviously is a far less drastic remedy than attempting, as Goodyear suggests,

to change the basic relationship between Atlantic and its dealers. Indeed, if the Commission were to follow Goodyear's suggestion—which, to be effective in opening up the Atlantic's TBA market to competition, would have to strike at the heart of Atlantic's control over its dealers—it would seem that Goodyear itself would no longer desire the sales commission arrangement. For, as the court of appeals stated (A.R. 3296), "the system integrates Atlantic's economic power over its service station market into the Goodyear TBA distribution system, thus giving Goodyear, for a price, a captive market," and the market no longer would be "captive" if Atlantic ceased to control it.

B. THE COMMISSION PROPERLY ENJOINED ATLANTIC FROM ENTERING INTO OR PERFORMING SIMILAR CONTRACTS WITH COMPANIES OTHER THAN GOODYEAR

Atlantic apparently challenges the remedy only insofar as it goes beyond the Atlantic-Goodyear contract to prohibit Atlantic from performing its present contract with Firestone and from entering into or performing similar contracts with other TBA companies.

The complaint alleged that both the Atlantic-Goodyear and the Atlantic-Firestone contracts were illegal (A.R. 8–12), and the Commission held (A.R. 124) that "the sales commission contracts between Atlantic and Goodyear and Atlantic and Firestone have unlawfully injured competition in the distribution of TBA at the manufacturing, wholesale and retail levels." Atlantic did the same things under both contracts, and the anticompetitive effects of the Firestone plan were no less serious than those of the Goodyear plan. As

the Commission ruled, the Firestone contract was just as illegal as the Goodyear arrangement, and the commission properly enjoined Atlantic from performing both of them. The fact that Firestone was not a party to this proceeding does not preclude the Commission from enjoining Atlantic, which was a party, from performing its illegal contract with Firestone. See *National Licorice Co.* v. *National Labor Relations Board,* 309 U.S. 350, 365–366, and cases there cited.

Since the basic vice of the sales commission plan is Atlantic's exercise of its economic power over its dealers to require them to purchase sponsored TBA, and since that same vice would be equally present in any similar contract that Atlantic might enter into with any other TBA firm, the Commission was fully warranted in making its cease-and-desist order run against such other agreements as well. *Federal Trade Commission* v. *Henry Broch & Co.,* 368 U.S. 360, 364; *Federal Trade Commission* v. *Cement Institute,* 333 U.S. 683, 728–729. Indeed, an order prohibiting a law violator from committing the same violation with others is a normal and usual form of administrative remedy.

C. THE COMMISSION PROPERLY ENJOINED GOODYEAR FROM ENTERING INTO OR PERFORMING SIMILAR CONTRACTS WITH COMPANIES OTHER THAN ATLANTIC

The prohibitions in the Commission's order directed against Goodyear are basically the same as those directed against Atlantic. That is, Goodyear is prohibited from performing its sales commission agreement with Atlantic, and from entering into or

performing similar contracts with any other oil company (A.R. 133–134). Goodyear was not only a party to an illegal agreement, but played an active role in carrying it out. Thus Goodyear representatives joined with Atlantic personnel in such activities as installing Goodyear signs and removing those of competitors, urging at Atlantic training schools that dealers use Goodyear products, and calling on Atlantic dealers to sell them TBA. Goodyear having been thus "caught violating the Act must expect some fencing in" (*Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 431).

Goodyear argues (Br. 44–53), however, that since the Commission's holding that the Goodyear-Atlantic sales commission plan is illegal rests upon Atlantic's use of its controlling power over its dealers to require them to purchase TBA, the Commission could not prohibit Goodyear from performing or entering into similar arrangements with other oil companies without proof (1) that such other companies had similar power over their dealers and (2) that the sales commission agreements with those companies resulted in a similar misuse of oil company power to force dealers to carry sponsored TBA. While the Commission's opinion did not articulate the reasons for the scope of the order, we submit that the record provided the Commission with a sufficient basis to conclude: (1) that the other oil companies with whom Goodyear had sales commission agreements had the same kind of economic power over their dealers as Atlantic; and (2) that in performing such agreements those companies did and were likely to do the same things that

Atlantic had done in performing its contract, with the same adverse effect upon competition. In these circumstances, the Commission did not exceed its "wide discretion in the choice of a remedy deemed adequate to cope with the unlawful practices" (*Jacob Siegel Co. v. Federal Trade Commission,* 327 U.S. 608, 611) when it barred Goodyear from performing similar contracts with other oil companies.

1. *The record shows that other oil companies have the same kind of power over their dealers as Atlantic*

In its opinion, the Commission referred to Goodyear's sales commission contracts with nine oil companies beside Atlantic (A.R. 62, fn. 1). While the record does not show the size of those companies, it is hardly open to question that each of them has incomparably greater power than any of the service stations through whom they distribute their products. The general sales manager of Atlantic, who obviously is familiar with general industry conditions, testified (G.R. 2353) that "[p]ractically all the branded companies operate principally with lessee dealers," and he further stated that only three oil companies were using long-term leases of three years' duration (AX 18, unprinted). The record contains evidence dealing specifically with the short term features of the leases and contracts between Shell Oil Company ("Shell") and Sinclair Oil Company ("Sinclair") and their dealers. Shell has leases with more than 4,000 dealers which run for only one year and are cancelable on 30 days' notice (G.R. 1310), and contracts with consignment dealers which may be terminated upon 24 hours'

notice (G.R. 3221–3224). Sherwood Brothers, a Sinclair subsidiary, has a dealer sales agreement cancelable upon 30 days' notice (G.R. 3470, 3473), and Sinclair itself rents necessary equipment to dealers under an agreement which is cancelable upon 5 days' notice (G.R. 3596, 3599).

2. *In performing their sales commission agreements with Goodyear, other oil companies used the same kind of pressure techniques that Atlantic did*

The Commission found that Goodyear's sales commission contracts with "other marketing oil companies * * * are in all material respects identical with the Goodyear-Atlantic contract" (A.R. 105), and that "The evidence of record in this case shows that oil companies other than Atlantic have employed coercive tactics in requiring their dealers to purchase Goodyear TBA" (A.R. 105).[40]

Most of Goodyear's contracts with other oil companies that are in the record are identical with Atlantic's.[41] These contracts thus impose upon those companies the same obligations that the Goodyear-Atlantic contract imposes upon Atlantic—"actively

[40] The Commission also indicated the substantiality of the commerce involved in Goodyear's arrangements with other oil companies, since Goodyear's sales under such contracts were about $16.7 million in 1951, and about $36 million in 1955 (A.R. 105, G.R. 3402–3403). Furthermore, the Commission referred to the anticompetitive effect of these sales commission programs in eliminating competition between Goodyear wholesalers, by the designation of supply points (A.R. 115–116, 3215).

[41] See contracts with Shell (G.R. 2498, 2503), Shamrock (G.R. 2515), Carter (G.R. 2522), Mid-Continent (G.R. 2558), D-X Sunray (G.R. 2569), Frontier (G.R. 2573), Quaker State (G.R. 2583), and Anderson-Pritchard (G.R. 2590).

[to] assist" in "selling and promoting" Goodyear products, and all the subsidiary actions which that duty comprehends, as defined in the contracts. See the Statement, *supra*, pp. 14–15.[48] In short, these contracts, like the Atlantic contract, require the other oil companies to bring to bear their full power over their dealers to require the latter to purchase Goodyear TBA. There is no reason to suppose that the other oil companies are any less vigorous than Atlantic in promoting sponsored TBA, or that the anticompetitive effects of their activities are any less significant. To the contrary, the record contains affirmative evidence that several companies pursued some of the very activities upon which the Commission rested its finding that the Atlantic-Goodyear arrangement violated Section 5.

When the Carter Oil Company (a division of Standard Oil Co. of New Jersey) signed a sales commission agreement with Goodyear, it arranged a series

[48] Goodyear's contracts with Sherwood (G.R. 2547), Sinclair (G.R. 2551) and Ashland (G.R. 2598), dating from an earlier period than those cited in the preceding footnote, are in different form. However, these three contracts also incorporate several of the provisions appearing in the later contracts, and similarly require the oil companies to push the sale of Goodyear products. They call for the oil companies to "actively assist" Goodyear in "selling and in promoting" sponsored TBA, to have their "field representatives call upon * * * [dealers] in company with our [Goodyear's] salesmen, to "cooperate and assist us [Goodyear] in our efforts to promote and encourage the sale of" sponsored merchandise, to see that its "field offices work energetically and efficiently with" Goodyear "with the view to assisting" Goodyear "in perfecting arrangements" with dealers, and to "at all times maintain adequate qualified personnel to render the services called for hereunder regularly and efficiently."

of dealer meetings (G.R. 2529), advised dealers peremptorily that, "As fast as current stocks of tires and other merchandise now in Carter warehouses and distribution points are disposed of, Goodyear merchandise will replace them, and your orders will be filled with Goodyear products" (G.R. 2534), and directed the swift installation of Goodyear identification and display advertising (G.R. 2531). Instructions to the dealers as to the latter program made it clear that they were expected to participate (CX 66A-L, G.R. 2543):

> One of the biggest chores connected with the new Carter-Goodyear T.B.A. arrangement is that of identifying service stations with Goodyear signs and window valences.
>
> Within the next few weeks your station will be visited by one of Goodyear's identification trucks, two of which are changing Carter stations over to the new T.B.A. identification.
>
> The identification trucks will be at your station about half a day, if it has not arrived already, and when they leave, your station will have much the same appearance as the one pictured above, with the Goodyear sign hanging prominently and Goodyear valences in the window.
>
> * * * * *
>
> You can help the changeover by preparing for the visit of the Goodyear truck. Scrape off the old Miller valence in your window and wash the windows thoroughly. Then when the Goodyear man arrives, he'll be in position to place Goodyear material in your windows in a minimum of time.

An important aspect of an effective program to push sponsored TBA is the selection and training of new dealers. A former Shell salesman stated that under his company's program "it is a must that they carry Goodyear tires and batteries and accessories. In fact you don't even have to ask the question, you just put them in or you don't accept the dealer as a Shell dealer" (G.R. 1324). The same salesman testified that he received instructions that a particular new dealer "had to purchase a supply of gasoline and motor oil, specialties, Goodyear tires and fan belts and accessories, which I seen to it that he had the proper product to sell gasoline, oil and tires" (G.R. 1327); that "My policy [as a Shell representative] was to place Goodyear tires and batteries in the stations" (G.R. 1329); that his superior told him, "If you can't get Goodyear tires in there, maybe you better start looking for another dealer" (G.R. 1316, see also G.R. 1319, 1356); and that "I told Mr. Laybold [a dealer] that he was to put Goodyear tires and batteries in, as it was a company policy" (G.R. 1330). Shell salesmen have instructed dealers to get rid of unsponsored goods (G.R. 1322, 1336). They can be relied upon to implement company policy, since the company sets quotas for them (G.R. 1422).

Sinclair also sets TBA quotas for its salesmen (G.R. 978–979), who visited dealers continuously and promoted Goodyear products during such visits (G.R. 1116–1117). Sinclair salesmen solicited orders for sponsored merchandise (G.R. 1117), and commented critically on the fact that a dealer was not purchas-

ing from his supply point (G.R. 1116, 1117, 1119–1120). A former Sinclair dealer testified as follows:

> Elmore [the Sinclair salesman] would come in there and say, "Mac, come here, I want to see you in the back room a minute."
>
> You would go in and you knew what he meant when he said "the back room." He would say, "Mac, we are checking over the inventories and so forth, and you are not purchasing so and so," or "I see something out front there. *You know you owe this business to the company.*" And they would lay down the law to you, real good. [G.R. 1117, emphasis added.]

The manager of the Tire and Merchandise Division of Sherwood (a Sinclair subsidiary) (G.R. 3518) stated that the "campaign to sell Goodyear" includes a plan that "each territory salesman must bring in to this office every two weeks an order for" Goodyear merchandise, which was expected to accelerate sales. A Sherwood salesman urged his superiors to put pressure upon a recalcitrant dealer, recommending that he be called into "the office for a thorough understanding as to his responsibility in merchandising our complete line" (CX 456A–B, G.R. 3567). A dealer was called into the Sherwood office, and confronted in a conference room by three Sherwood officials. The witness described the meeting (G.R. 1112–1113):

> A. * * * So to make the conversation short, Mr. McCauley [a Sherwood official] was in a hurry and he said, "We will make this brief, Mac. You are not buying batteries from us."

I said, "No, Mac, I can't buy batteries from you. I owe an allegiance to Bowers, because they took care of me during the war and immediately after the war, and I promised them if they would help me so I could remain in business satisfactorily, that I would see that they maintained and kept the business."

And his almost exact words were, "We don't give a good God damn who you think you owe, you are going to buy our [Goodyear] batteries or else."

And that was the end of the meeting.

A former Shell salesman testified that Goodyear window advertising is the only TBA advertising in Shell stations in certain territories (G.R. 1325) and that "Instructions were that if non-sponsored advertising were exhibited in these stations, it was to take them down" (G.R. 1325). Shell's efforts to control advertising were successful; witnesses testified that only sponsored advertising appears in Shell stations and that such stations refuse to permit the installation of unsponsored advertising (G.R. 1156, 1178, 1222, 1228). The same situation existed in regard to Sinclair and Sherwood stations (G.R. 340, 1060, 1151, 1167, 1176, 1228). One Sherwood dealer testified that a pole sign was taken down without his request and replaced by a Goodyear sign (G.R. 983-984). And Sherwood, which exhorted its dealers to take advantage of the company's modernization plan, installed Goodyear fixtures and hardware as a part of this plan (G.R. 3541-3545). Shell, Sinclair and Sherwood limit credit card purchases to sponsored products, a practice that results in compelling dealers—

who recognize the importance of credit card sales—to carry sponsored TBA (G.R. 984, 1105, 1127, 3622–3623, 3625, 3490–3491, 3535).

Finally, the record shows instances in which Shell and Sinclair threatened to cancel the leases of dealers who carried unsponsored products (G.R. 971, 1112–1113, 1294, 1320–1321, 1326). One such incident reviewed in the Commission's opinion (A.R. 105–106, 122–123), was Sinclair's threat to cancel dealer Osborn for buying Firestone tires (available to him at lower prices than the sponsored Goodyear TBA).[43]

The result of these practices is that dealers of other oil companies that have Goodyear sales commission contracts understand and believe, as do the Atlantic dealers, that they are required to purchase sponsored Goodyear TBA and may not purchase other products;[44] and that sellers of unsponsored TBA are able to make only insubstantial sales to such dealers (G.R. 331, 339, 834–835, 1020–1021, 1040–1042, 1148–1149, 1154–1155, 1168–1170, 1173, 1174, 1179, 1222–1226, 1247–1248, 1255, 1282–1283, 1286, 1294–1296).[45]

In the light of this evidence in the record, and in the absence of any contrary evidence on this point

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[43] This threat led to an overt tying agreement for the purchase of sponsored TBA, which the Fourth Circuit held illegal in *Osborn* v. *Sinclair Refining Co.*, 286 F. 2d 832, certiorari denied, 366 U.S. 963.

[44] For instances of dealers' failure to buy from such competitors even though the latter sell at lower prices, see G.R. 1175, 1178–1179, 1294; see also G.R. 1114–1116.

[45] The record shows that Goodyear sales commission plans had the following additional anticompetitive effects: territories were divided when other oil companies agreed (as did Atlantic) to sponsor Goodyear TBA to some of its dealers, another brand to others (*e.g.,* Shell, D–X Sunray, Ashland, G.R. 455, 2563, 2605); and intrabrand competition between Goodyear TBA

(Goodyear introduced no evidence at all in this case, see G.R. 2370-2371), the Commission did not act unreasonably or arbitrarily in drawing the inference that other oil companies, in performing their sales commission agreements with Goodyear, had engaged, and were likely to engage, in the same practices as Atlantic; and that those other agreements therefore resulted in sufficiently serious injuries to competition to warrant prohibiting Goodyear from performing them or entering into others. If, as Goodyear suggests, there are individual oil companies who either do not have the same power over their dealers or would not similarly exercise it in carrying out their plans, Goodyear may always seek from the Commission an exception to the order for the particular case. Thus "[a]s actual situations arise they can be presented to the Commission in evidentiary form rather than as fantasies" (*Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 431; see *International Salt Co.* v. *United States*, 332 U.S. 392, 401). Despite the breadth of the present order, "[t]he Commission's offices will still be open for discussion" (*Vanity Fair Paper Mills, Inc.* v. *Federal Trade Commission*, 311 F. 2d 480, 488 (C.A. 2)). See the Commission's power to reopen and modify orders in Section 5(b) of the Act, supra, p. 4.

The Commission, of course, "has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices" disclosed, and "the courts will not interfere except where the remedy selected has

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wholesalers was restrained through the assignment of supply points (A.R. 115-116; G.R. 1114-1116, 1057-1061; see CX 400M, GR. 3407).

no reasonable relation to the unlawful practices found to exist." *Jacob Siegel Co.* v. *Federal Trade Commission,* 327 U.S. 608, 611, 613; *Federal Trade Commission* v. *Ruberoid Co.,* 343 U.S. 470, 473. The Commission's conclusion that in all the circumstances of this case effective relief required that Goodyear should be barred generally from using the sales commission plan at all, and not just prohibited from using it with Atlantic, cannot fairly be said to have "no reasonable relation to the unlawful practices found to exist."

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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